Petition

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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

No. _____

GEORGE SUMNER, WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,

Petitioner,

v.

ROBERT MATA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals fail to follow the mandate of this Court in Sumner v. Mata (1981) 449 U.S. 539?

A. Were there any factual findings by the California state courts to which the presumption of correctness in 28 U.S.C. § 2254(d) might be applied?

B. If so, did the Court of Appeals correctly apply section 2254(d) to those findings?

2. Did the Court of Appeals apply an erroneous standard in evaluating respondent's claim that he was denied due process by the use of pretrial identification procedures?

A. Does the availability of a person for a physical line-up render the use of photographic identification procedures constitutionally suspect?

B. What criteria should be applied in determining whether identification evidence possesses sufficient reliability to justify its admission?

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 29, 1981.

OPINION BELOW

The opinion of the Court of Appeals is reported at 649 F.2d 713 and is attached to this petition as Appendix E. Its order denying a petition for rehearing and rejecting a suggestion for rehearing in banc is unreported and is attached as Appendix F. A prior opinion of the Court of Appeals in this case, which was adopted in its most recent opinion "insofar as it discussed the merits of the controversy," is reported at 611 F.2d 754. A copy of the prior opinion is attached as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 29, 1981. Its order denying a timely petition for rehearing and rejecting a suggestion for rehearing in banc was filed on August 6, 1981. This petition for certiorari was filed within 90 days

of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOVLED

United States Constitution, Amendment XIV, section 1, provides in part:

> ". . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

Title 28, United States Code, section 2254 provides in pertinent part:

> "(a) the Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground

that he is in custody in violation of the Constitution or laws or treaties of the United States.

. . .

"(d) in any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall

be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such

factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court

concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

STATEMENT OF THE CASE

A. Proceedings in the State Courts.

On July 4, 1973, respondent was sentenced to life imprisonment following his conviction for first degree murder in the Superior Court of California, County of Kern.

On his direct appeal, the California Court of Appeal affirmed the judgment of conviction. A copy of the Court of

Appeal's opinion is attached as Appendix C.

No petition for hearing by the California Supreme Court was sought.

In State habeas corpus proceedings, the Superior Court for the County of Marin denied respondent's petition in a minute order on April 1, 1977; the Court of Appeal for the Fifth Appellate District summarily denied respondent's petition on August 2, 1977; and the California Supreme Court summarily denied respondent's petition on November 14, 1977.

B. Proceedings in the Federal Courts.

On December 9, 1977, respondent filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of California. On May 23, 1978, the district court filed a judgment and order denying the petition.

A copy of the court's opinion is attached as Appendix D.

On December 21, 1979, a majority of a panel of the United States Court of Appeals for the Ninth Circuit reversed the judgment of the district court and remanded the case to that court with directions to "hold the Petition in abeyance for a period of ninety days, within which time California's prosecutors may, if they so choose, initiate a new trial against the appellant, a trial in which prosecutorial evidence barred by the federal Constitution will not be introduced." 611 F.2d at 760.

A petition for rehearing and suggestion for rehearing in banc was filed on January 4, 1980. On January 31, 1980, the court denied the petition for rehearing (though one judge would have granted it) and all three judges rejected the suggestion for in banc review.

A petition for writ of certiorari was timely filed and was granted by this Court on July 2, 1980. In an opinion filed on January 21, 1981, this Court vacated the Ninth Circuit's opinion and remanded the case to it for further proceedings consistent with its opinion. Sumner v. Mata, supra, 449 U.S. 539.

On June 29, 1981, without receiving further evidence, the Ninth Circuit issued another opinion. It adopted its prior opinion "insofar as it discussed the merits of the controversy" 649 F.2d at 714. It again concluded that the order of the district court should be reversed and that respondent Mata should be granted a new trial at which "constitutionally impermissible" evidence could not be introduced against him. Id. at 717. One judge again dissented. Id. at 717-718.

A petition for rehearing and suggestion for rehearing in banc was timely filed on July 13, 1981. The petition for rehearing was denied by a majority of the panel (with one judge dissenting) on August 6, 1981, and the suggestion for rehearing in banc was rejected on the same day.

C. Statement of Facts Adduced at Trial.

1. The Murder.

Rumor that the victim, Leonard Arias, was being transferred to the California Correctional Institution at Tehachapi preceded his arrival (RT 638-639, 1162). Arias, a member of the "Nuestra Familia" prison gang, had reportedly stabbed a member of the rival "Mexican Mafia" gang at San Quentin Prison. In retaliation, the "Mexican Mafia" put out a "contract" on his life (RT 823, 955).

Carlos Ortega, chief of the "Mexican Mafia" at Tehachapi, testified that

respondent Mata and his two codefendants, Gallegos and Vargas, were "Mafia" members (RT 811-812, 834-844). In October of 1972, Mata informed Ortega that they had been ordered to "hit" Arias and advised him of Arias' arrival at Tehachapi (RT 822-824). On October 19, 1972, Ortega met with Mata and Gallegos, who wanted to "get down" (i.e. -- arm themselves with knives and stab Arias) (RT 827-828). Vargas joined them and said, "We've waited long enough." (RT 828-829). Mata, wearing black gloves, tried to give Ortega a knife but Ortega refused (RT 829-830). Mata said he had another knife inside his belt (RT 831).

Joe Escobar, an officer of the Nuestra Familia, observed the three defendants talking with Ortega before proceeding toward Dorm 8 (RT 1175-1176). All three were wearing watch caps, and

Mata and Gallegos were wearing gloves and blue Levi jackets (RT 1176).

In Dorm 8, the victim was socializing with inmates Jay Allen and Rigoberto Almengor (RT 583-584, 600). Paul Childress, another inmate who lived in Dorm 8, knew Mata from a prior drug deal and noticed him standing by the bulletin board in the dorm (RT 268, 273). He also observed Gallegos walking in the dorm (RT 271-272).

At about 1:30 p.m., Arias, accompanied by Allen and Almengor, started to leave the dorm (RT 372-373, 583). There was daylight in the dorm and visibility was excellent (RT 801, 947).

Almengor saw two inmates standing by the bulletin board and a third inmate leaning against a nearby wall. They did not live in Dorm 8 and he did not know them, though he had seen Vargas before (RT 374, 745, 957-958, 966). Allen also

saw the three men (RT 795). He knew Mata since they once resided in the same dorm (RT 595). In tape recordings made during the next eleven days, both Allen and Almengor described all three as wearing black leather gloves, state-issue jackets and pants and navy blue knit caps (RT 621-622, 746, 969). Allen thought all three men had mustaches (RT 621). Almengor described one of the men as dark complected, with a small, thin mustache, and described Vargas as "an Indian dude" with a thicker mustache, who was taller than the other two (RT 479, 961, 970).

As Arias and his companions approached, the three defendants attacked Arias with knives (RT 958). Vargas, armed with a long knife, pulled down Arias' shoulder and stabbed him (RT 749, 795-796, 959). Vargas also jabbed

at Allen, and ripped his jacket (RT 796).

Meanwhile, in the midst of this attack, Almengor and Mata made eye contact. Mata came at him with a knife (RT 379, 747, 960). He swung twice, and Almengor tried to kick the knife out of his hand (RT 380). They then fought with their fists, swinging several times at each other (RT 380, 747, 960).

As Mata backed off, they stood "looking directly at each other." (RT 960). Turning his attention back to the stabbing, Almengor heard and saw a knife fall to the floor, and saw Arias falling (RT 381-382, 747-748). Almengor again looked Mata in the face, motioning that he wanted nothing to do with this (RT 382). Mata seemed to understand. He turned and ran out the door, followed by his codefendants (RT 383, 748, 960).

Childress testified that he observed Arias, Mata, Gallegos and Vargas fighting

(RT 275, 279). He thought it was just a fight until he saw a small silver knife fall to the floor (RT 276). He then returned to his bunk area (RT 281).

One and a half minutes after hearing the fight in Dorm 8, inmate Juan Olvera saw Gallegos coming from nearby Dorm 6 (RT 512). He told Olvera, "If they ask about me, tell them I have been with you for the last hour" (RT 513). Gallegos was nervously clenching a pair of black leather gloves (RT 514). A short time later, Gallegos was seen in the library, exchanging a magazine containing a piece of shiny metal with another inmate (RT 1179).

At about 2:00 p.m. a search of the institution was conducted (RT 658). A knife was discovered in the trash can of Dorm 5, and a blue Levi jacket with blood on the sleeve was found under bunk 56 of that dorm (RT 659-661). Almengor

testified that this knife looked like Mata's knife (RT 380). Mata resided in bunk 60 of this dorm (RT 658, 662).

The following day, Childress became frightened by the actions of several Mexican inmates, including Mata, with reference to him (RT 283-284, 948-949, 952). He went to Sergeant Mills' office and told Mills what he had seen, identifying Mata and Gallegos by name (RT 284-285, 693, 947-948). He identified photographs of Mata and Gallegos (RT 285-286, 676, 681). After looking at about 70 photographs of inmates from Dorms 5 and 7, he finally identified Vargas' picture from the photos of inmates in Dorm 6 (RT 681-682).

At trial, Allen and Almengor made definite in-court identifications of Mata and Gallegos, but repudiated their pretrial identifications of Vargas and would not identify him in court (RT 375,

404, 418-419, 425-426, 587, 597, 623-624).

Respondent Mata's defense was alibi. He offered three witnesses who testified that he was on his own bed playing cards near the time when the stabbing occurred (RT 1016, 1106, 1131).

2. The Pretrial Identification Procedures.

October 19, 1972.

Allen and Almengor were both interviewed on the evening of the stabbing (RT 710, 719-720, 914, 923-924). Allen said he was unable to make any identifications and was not shown any photographs (RT 719-720, 924). Almengor asked to be shown photographs of the Mexican population in the medium security side of the facility, and was shown about 200 photographs of all the inmates on that side (RT 397, 914, 959). Almengor named "Bogus Pete" Nunez as one

of the assailants -- a name provided to him by other inmates based upon his description of one of the men he had seen (RT 399-400, 711). Almengor identified a photograph of Nunez but was not positive, saying it looked similar to the assailant (RT 398-400, 711, 780-781). He also tentatively identified defendant Vargas, and inmates Ramirez and Reymundo (RT 914-915). Almengor testified that he selected eight photographs as bearing similarity to the three assailants (RT 401, 466). Almengor requested larger, more recent photographs (RT 401). He also requested a line-up, which prison officials agreed to provide. However, the line-up never occurred and Almengor never renewed his request (RT 497, 781).

October 27, 1972

Thereafter, a major prison disturbance prevented contact with Allen and Almengor for the purpose of making

identifications until October 27, 1972 (RT 725, 927).

Allen was shown a group of 24 photographs (People's Exhibit 23)[1/] which included pictures of Mata, Gallegos and Vargas. He again claimed he was unable to make an identification, complaining that the photographs were too old (RT 720-721, 924). Almengor also viewed Exhibit 23 (RT 715). Outside Allen's presence, Almengor again tentatively identified Vargas (RT 437, 959). He asked for more recent photographs, feeling that the appearance of inmates represented in the photographs had changed (RT 716, 959-960).

Acting on this request, a number of inmates were photographed, but due to a

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1. Exhibits 23 and 24 were transmitted to this Court by the Clerk of the United States Court of Appeals for the Ninth Circuit on April 15, 1980.

mistake by the photographer, the pictures did not come out (RT 716). The three defendants were photographed a second time, and other photographs were reproduced to the same size (RT 716). These photographs were incorporated into a group of photographs which were introduced at trial as People's Exhibit 24. All 15 photographs included in this group are black and white, are the same size, have the same quality of "newness" and are of inmates of Mexican descent.

October 30, 1972

Almengor and Allen were shown the group of photographs introduced as Exhibit 24. Almengor identified Mata, Gallegos and Vargas. He was able to identify Mata because "he was looking at me eye-to-eye . . . at the time of the stabbing . . . ." (RT 742).

Allen was brought in next. While Almengor stood on the other side of the room, Allen also identified Mata and his codefendants as the assailants (RT 722). He testified that when he was first shown the pictures he did not make any identifications because he did not want to get involved (RT 650). His identifications were based on his observations at the scene, and the correctional officers did not influence them (RT 650).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit has interpreted this Court's initial opinion in this case, which was intended to give "some content" to the expression of congressional intent in 28 U.S.C. § 2254(d), in a manner which would rob that statute of any practical application in the vast majority of cases. In the Ninth

Circuit's view, when the question presented by a federal habeas claimant is a "mixed question of law and fact" (i.e. -- a question calling for the application of law to a particular factual situation), the federal courts are not required to give any deference to implicit or explicit findings of fact by the state courts. This approach is contrary to the Court's opinion in this case, to its past opinions, and to the purposes of section 2254(d). Certiorari should be granted so that this Court can explicate the proper approach for federal habeas courts in cases where the state courts have already made findings regarding the facts underlying the federal claim.

Certiorari should also be granted so that this Court can define the proper standard to be applied in determining a claim that the use of pretrial

identification procedures has resulted in a denial of due process of law. The Ninth Circuit held that the availability of a person for a physical line-up renders the use of photographic identification procedures constitutionally suspect. Other circuits have held that this fact is immaterial. Since this issue is certain to recur, this Court should again grant certiorari to decide this important question.

ARGUMENT

I

THE COURT OF APPEALS FAILED TO FOLLOW THIS COURT'S MANDATE.

This Court's previous opinion was intended to provide guidance to the lower federal courts as to how they could ease the inevitable friction between federal and state courts which is caused by federal habeas corpus proceedings

initiated by state prisoners. It attempted to give "some content" to the provisions of 28 U.S.C. § 2254(d) so that "the will of Congress be not frustrated." Sumner v. Mata, supra, 449 U.S. at 550. The Ninth Circuit's opinion on remand has the practical effect of robbing section 2254(d) of any content. If that opinion is allowed to stand, section 2254(d) will become merely a nuisance for federal courts ruling on the claims of state prisoners -- something which must be ritually acknowledged, then distinguished in a simple sentence or two, and then forgotten. We submit that this was not the intent of Congress and that this Court must grant certiorari in this case to further explicate its previous holding, which was obviously misunderstood by the Ninth Circuit.

The Ninth Circuit's opinion on remand states that when a federal habeas court is faced with a "mixed determination of law and fact that requires the application of legal principles to 'historical facts'" the question is "freely reviewable" by the federal courts, which are not required to give any deference to the factual findings of other courts which have considered the case. 649 F.2d at 716, 717. Therefore, the Court found that it could adopt the "reasoning and conclusion of its prior opinion," Id. at 717, and that it did not have to discuss the factual findings of any other court.

This conclusion was reached although this Court's opinion gave many indications that section 2254(d) should not be given such a restrictive application. For instance, the Court stated that section 2254(d) applied to this case and

that the Ninth Circuit's initial opinion had not applied the statutory "presumption of correctness" to the factual determinations of the California state courts. 449 U.S. at 547. The Ninth Circuit, however, held that the "presumption of correctness" was "not invoked in this case." 649 F.2d at 715-716. If this simple explanation were all that is necessary to comply with the mandate of section 2254(d), then it would appear that this Court's prior opinion was largely dicta. Indeed, this seems to be the interpretation which the Ninth Circuit gave to this Court's prior opinion. Thus, although this Court stated that the Ninth Circuit's findings were "considerably at odds" with those of the state courts, 449 U.S. at 543, the Ninth Circuit stated that its disagreement with the California courts was primarily over

application of a legal standard. 649 F.2d at 717. Indeed, it gratuitously stated that it "substantially" agreed with the historical facts found by the state courts.[2/] Id. at 717.

It did not explain why it made factual findings which are not supported by the state court record. For example, it acknowledged that the witnesses had an opportunity to view the perpetrators of the crime, but then discounted this factor by stating that "the violence accompanying the incident and the threat presented by the knife would have, quite likely, diverted the witnesses' attention." 611 F.2d at 758 (emphasis added). The "diversion of the witnesses' attention at the time the crime was committed"

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2. The court did not state why its agreement was only "substantial" or identify particular factfindings with which it did and did not agree.

was again mentioned as a factor compelling the conclusion that the photographic identification procedures were impermissibly suggestive. Id. at 759. The existence of this fact is at odds with the California Court of Appeal's finding that "the witnesess had an adequate opportunity to view the crime," (Appendix C, page 8) and supported by nothing in the record.

At another point the court inferred as a fact that the prison officials' refusal to conduct a corporeal line-up "stemmed from [their] reluctance . . . to provide appellant with the assistance of counsel which would be required in a line-up procedure." 611 F.2d at 759, n. 1. The record before the court showed clearly that the initial complaint in this case was filed on November 6th, 1972, long after the identification procedures

were completed (CT 4-5). The right to counsel at a line-up arises only when a person has been formally charged with a criminal offense. Kirby v. Illinois (1972) 406 U.S. 682. Thus, the court's "inference of fact" appears to be based on a misapprehension of federal constitutional law.

Nor did the court explain why it made findings completely at odds with those of the state court with respect to some matters. For example, the California Court of Appeal, in a part of its opinion which was quoted in this Court's opinion, stated, "We further find that there is no showing of influence by the investigating officers . . ." 449 U.S. at 542. The Ninth Circuit stated that, "considerable pressure from both the prison officers and opposing prison factions had admittedly been

brought to bear on both witnesses." 611 F.2d at 759.

At another point in its opinion, under the heading "Facts," the California Court of Appeal held:

> "Appellants argue that the witnesses Almengor and Allen were housed in the same segregation unit with appellants, that they were aware that appellants were removed from the segregation unit to have their pictures taken and that this makes their identification inadmissible. But they make no showing, and the record supports none, that the witnesses were in fact influenced in their identifications by this action of the investigating officers."
>
> Appendix C, p. 6.

The Ninth Circuit plainly did not accept this factual conclusion and did not explain why it did not. It stated:

> "This defense asserted that when the defendants were taken to be photographed, they were led out of the segregation unit in partial view of Almengor and Allen. It is disputed whether Almengor or Allen actually recognized the defendants as the persons who were to be photographed." 611 F.2d at 756.

The opinion of the California Court of Appeals should have removed any element of dispute regarding the matter. If it did not, the Ninth Circuit was required to say why it did not.

At yet another point the California Court of Appeal discussed the viewing of photographs by witness Almengor on October 19, 1972, the date of the incident. It stated: "He made a possible identification of appellant Vargas, but made possible misidentifications of the other two participants." Appendix C at p. 5 (emphasis added). The Ninth Circuit's opinion, discussing the events of the same date, stated: "He [Almengor] selected eight photographs, making a positive identification of Pete Nunez as the person who did the stabbing . . . ." 611 Fed.2d at 756 (emphasis added). The court did not state why its factfinding differed from that of the California Court of Appeal.

Under Section 2254(a), a person in custody pursuant to the judgment of a State Court may apply to the federal

courts for relief "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." This presupposes that the federal habeas court will, in every case presented to it under section 2254, be called upon to resolve a question of federal law. It is difficult to imagine how a pure question of fact could be presented under section 2254. Except in unusual cases, questions of law are not decided in the abstract. There must generally be factual findings to which the controlling legal principles are to be applied. In Townsend v. Sain (1963) 372 U.S. 293, the Court noted that a federal evidentiary hearing would be required to make the underlying factual findings unless the state court trier of fact reliably found the relevant facts after a full hearing. Id. at

312-313. The Court's amplification of the circumstances when a federal evidentiary hearing would and would not be required was, in large measure, subsequently enacted by Congress as section 2254(d). See Brewer v. Williams (1977) 430 U.S. 387, 395. The Court in Townsend was careful to distinguish between findings of fact and conclusions of law by the state courts. The Federal Courts may defer to reliable factfindings, but not to conclusions of law. Id. at 318. In Cuyler v. Sullivan (1980) 446 U.S. 335, the Court further explicated this distinction, noting that a determination of the roles which certain lawyers played in the defense of Sullivan and his codefendants would be a finding of fact, but that a holding that the lawyers did not engage in multiple representation would be a mixed question of law and fact -- it

would require the application of legal principles to historical facts. Id. at 342. But it does not follow from this that the federal courts are free to ignore the factual determinations of the state courts when the issue before it requires application of legal principles to particular facts. This point was made crystal clear in cases such as LaVallee v. Delle Rose (1973) 410 U.S. 690. In that case the state trial court, after a hearing in which conflicting evidence was presented, concluded that a confession was voluntary. This Court held that the state court's implied findings of historical fact were entitled to the "presumption of correctness" mandated by Section 2254(d). As was noted in Townsend v. Sain, supra, at 312, "It is the typical, not the rare, case in which constitutional claims turn

upon the resolution of contested factual issues." The fundamental error in the Ninth Circuit's approach is its belief that where such a "mixed question of fact and law" is involved, the federal courts are not required to defer to either the state court conclusions of law or findings of fact by virtue of section 2254.[3/] We submit that this is a gross

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3. Other federal courts, seeking to follow this Court's mandate in Sumner v. Mata, supra, have in appropriate cases deferred to state court factfindings when presented with mixed questions of fact and law.

For example, in Cowell v. Duckworth (N.D. Ind. 1981) 512 F.Supp. 371, the petitioner claimed that his confession was involuntary. Citing this Court's opinion, the district court held that the state trial court's determination, on conflicting evidence, that the petitioner had been advised of his constitutional rights and waived them before confessing was supported by testimony in the record and should therefore not be disturbed by the federal courts. The same approach was followed in Brown v. Cuyler (E.D. Pa. 1981) 510 F.Supp. 171.

misinterpretation of section 2254(d), especially in light of the fact that this Court has already had occasion in this case to stress the application and the importance of section 2254(d) in cases of this sort. We submit that certiorari should be granted in this case so that this Court can explicate that which was implicit in its earlier opinion -- that the Ninth Circuit has thus far failed to either accord proper deference to the findings of historical fact by the state courts or, at the very least, to even attempt to explain its failure to do so.

II

THE COURT OF APPEALS APPLIED AN ERRONEOUS STANDARD IN EVALUATING RESPONDENT'S CLAIM THAT HE WAS DENIED DUE PROCESS OF LAW BY THE USE OF PRETRIAL IDENTIFICATION PROCEDURES.

When this case was first presented to the Court by petition for writ of certiorari, one of the questions raised was whether the court of appeals applied erroneous standards in evaluating respondent Mata's claim of denial of due process in the use of pretrial identification procedures. Certiorari was granted on this question and it was briefed and argued by the parties. However, the Court did not reach this question in view of its conclusion that the court of appeals' failure to discuss the applicability of section 2254(d) required remand of the case to that court for further proceedings. On remand the

court did not discuss again the standards to be applied in determining respondent's due process claim. Instead, it adopted its earlier opinion in its entirety "insofar as it discussed the merits of the controversy." 649 F.2d at 714. Thus, the question of whether the court of appeals applied an erroneous legal standard in evaluating respondent's due process claim is presented to this Court in substantially the same context as it was in our initial petition.

The court of appeals held that a court should follow a "two-part approach" in determining whether a conviction based on eyewitness identification evidence should be set aside on the ground that a pretrial photographic identification procedure was so impermissibly suggestive as to give rise to a very

substantial likelihood of irreparable misidentification. 611 F.2d at 757. The first part of this approach involves consideration of the "necessity of the photographic identification." Id. The second part involves consideration of "whether there was a very substantial likelihood of irreparable misidentification.'" Id., at 758 (citation omitted).

We submit that this "approach" departs radically from the holdings of this Court. Despite the fact that this Court has stressed that reliability is the "linchpin" in determining the admissibility of such evidence, the Ninth Circuit's approach introduces factors which have no possible bearing on reliability. Furthermore, it conflicts with the interpretation of this Court's holdings reached by the other circuits and by the state courts. Since the Ninth

Circuit's articulation of this approach appears to be a considered pronouncement, based on a line of previous Ninth Circuit cases, it cannot be classified as an aberrant decision which is unlikely to influence the results of other cases.[4/]

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4. This case appears to be part of a significant line of cases decided by the Ninth Circuit in which its "two-part approach" was used to resolve questions regarding the admissibility of identification evidence following pretrial identification confrontations in a variety of factual contexts. In addition to the cases cited by the court, it was used in McNeary v. Stone, 482 F.2d 804 (9th Cir. 1973), cert. denied, 414 U.S. 1071; and United States v. Bennett, 445 F.2d 638 (9th Cir. 1971), cert. denied, 404 U.S. 1023; see also United States v. Stubblefield, 621 F.2d 980, 983 (9th Cir. 1980).

A. The availability of a defendant for a physical line-up does not render the use of photographic identification procedures constitutionally suspect.

Since Mata was a state prison inmate at the time the photographic identification procedures were utilized, the court of appeals quickly concluded that there was no necessity for their use. This conclusion was apparently based on tacit assumptions that "necessity" could not be shown in a situation where the defendant was in custody and that the burden of showing "necessity" was on the prosecution, even in the absence of an objection to admission of the identification evidence.

Discussing the weight to be given lack of necessity, the court held:

> "While lack of necessity is not a per se ground for rejection of the identification, we have consistently held that necessity is an important factor to be considered in judging the validity of the identification procedures." Id., at 757 (citations omitted).

Nothing in this Court's 1967 trilogy of cases regarding pretrial identification procedures, United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); and Stovall v. Denno, 388 U.S. 293 (1967) supports a conclusion that lack of "necessity" for use of a particular pretrial identification procedure enters into the assessment of whether the procedure actually used resulted in a denial of due process.

In Simmons v. United States, 390 U.S. 377 (1968), he first of this Court's cases dealing with a pretrial identification by photograph, the Court's opinion mentioned the reasons why the particular photo identification procedures were employed, but did not suggest that lack of "necessity" for use of photo identification procedures would weigh in favor of a finding that their use violated the defendant's due process rights.

In Neil v. Biggers, 409 U.S. 188 (1972) the Court synthesized the general principles to be gleaned from its earlier cases and articulated them with greater precision. The Court stated:

> "It is, first of all, apparent that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.'

Simmons v. United States, 390 U.S., at 384. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process . . . ."

Id., at 198 (footnote omitted). The Court then stated that:

"What is less clear from our cases is whether . . .

> unnecessary suggestiveness alone requires the exclusion of evidence. While we are inclined to agree with the courts below that the police did not exhaust all possibilities in seeking persons physically comparable to respondent [in order to construct a line-up], we do not think that the evidence must therefore be excluded." Id., at 198-199 (footnote omitted).

In Manson v. Brathwaite, 432 U.S. 98 (1977), a case involving a pretrial identification made after a police officer viewed a single photograph of the defendant, the Court stated that admission of evidence concerning a suggestive and unnecessary pretrial identification procedure would not violate due process as long as the identification itself

possessed sufficient aspects of reliability. No evidence was offered as to why the single photo was shown to the witness, instead of a photo array. At trial the officer testified regarding his identification of the photograph and also identified the defendant in person. This Court, in holding that evidence of the pretrial identification was properly admitted, reaffirmed the views it expressed in Neil v. Biggers and declined the opportunity to formulate an automatic rule of exclusion of evidence of pretrial identifications made following suggestive and unnecessary pretrial identification procedures. Id., at 110-113. In doing so it stressed that the standard to be applied in determining whether such evidence should be admitted or excluded was the standard of fairness required by the due

process clause of the Fourteenth Amendment. Id., at 113-114.

It is Manson which most dramatically underscores the error in the Ninth Circuit's approach. That approach equates lack of "necessity" for the use of photographic identification procedures with impermissible suggestiveness and requires a court to proceed directly from a finding of lack of "necessity" to application of criteria for determining whether the identification evidence possessed sufficient aspects of reliability to justify its admission. The lack of "necessity" is given weight among these factors as tending to detract from the reliability of the evidence. 611 F.2d 757, 759.

The Ninth Circuit's approach is also contrary to the decisions of other circuits which have attempted to articulate standards to be applied in determining

whether a defendant's due process rights have been violated because of pretrial identification procedures.[5/]

In United States v. Marchand, 564 F.2d 983, 995 (2nd Cir. 1977), cert. denied, 434 U.S. 1015, the court stated:

> "While it is preferable for law enforcement officers to use a line-up rather than photographic identification when the suspect is available, this is not a requirement."

To the same effect are United States ex rel. Pella v. Reid, 527 F.2d 380, 384 (2nd Cir. 1975) and United States v. Boston, 508 F.2d 1171, 1176-1177 (2nd

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5. This conflict among the circuits was noted by Mr. Justice Rehnquist in his initial opinion granting petitioner's application for a stay in connection with the filing of the first certiorari petition. Sumner v. Mata, 446 U.S. 1302, 1305-1306 (1980) (opinion of Mr. Justice Rehnquist, as Circuit Justice).

Cir. 1974), cert. denied, 421 U.S. 1001.

In United States v. Evans, 484 F.2d 1178, 1184 (2nd Cir. 1973), the court, citing earlier Second Circuit cases, stated that the Simmons test is "a two-fold one." ". . . [T]o sustain the exclusion of identification testimony, there had to be a showing both of impermissibily suggestive procedures and of the substantial likelihood of misidentification. Where one or both were lacking, this court concluded that eyewitness identification testimony was to be admitted." Id., at 1184; see also United States ex rel. Pella v. Reid, supra, 527 F.2d at 383-384. The court specifically rejected a contention that "taint" is established prima facie when the government has failed to use a "more reliable source of identification" when it is able to do so. Id., at 1186, n. 8.

In United States v. Gidley, 527 F.2d 1345 (5th Cir. 1976) rehearing denied, 530 F.2d 976, cert. denied 429 U.S. 841, a case in which witnesses viewed a photo spread approximately two weeks before trial, the court stated that the Simmons standard "has developed into a two-prong test." Id., at 1350. The Fifth Circuit's two prongs were markedly different from the Ninth Circuit's. The Fifth Circuit identified them as:

> "First, the court must decide whether or not the photographic display was impermissibly suggestive. Second, the court must determine whether such a display created a substantial risk of misidentification at trial." Id., at 1350.

Discussing the first "prong" the

court stated:

> "In determining whether the photographic display was impermissibly suggestive, we evaluate only the picture spread itself -- whether other more desirable methods of identification were available or whether there was a compelling need for a photographic display are not relevant in the determination." Id., at 1350.

Similarly, in United States v. Allison, 616 F.2d 779, 783 (5th Cir. 1980), cert. denied, ___ U.S. ___ 101 S.Ct. 156, the court stated:

> ". . . [t]he fact that there may have been time for a line-up can play no part in whether the photographic spread was impermissibly suggestive.

'Whether other more desirable methods of identification (e.g., a line-up) were available, or whether there was a compelling need for speedy identification are . . . not relevant to a determination of the impermissible suggestiveness issue.'"

Gidley has been consistently followed in the Fifth Circuit. Among the recent cases following it are Frank v. Blackburn, 646 F.2d 873 (5th Cir. 1980) (in banc opinion adopting a portion of the panel opinion appearing at 605 F.2d, pages 912-913); Preacher v. Estelle (5th Cir. 1980) 626 F.2d 1222, cert. denied, ___ U.S. ___ 101 S.Ct. 1389; and Hudson v. Blackburn, 601 F.2d 785 (5th Cir. 1979), cert. denied 444 U.S. 1086. To the same effect is United States v.

Cueto, 611 F.2d 1056 (5th Cir. 1980).

In United States v. Hurt, 476 F.2d 1164 (D.C. Cir. 1973), the court held that the five factors enumerated in Neil v. Biggers are to be considered only if the identification procedures are found to be suggestive. Id., at 1167-1168. The court also held that there is no absolute constitutional right to a line-up. Id., at 1168.

The Ninth Circuit's approach is not supported by authorities outside the federal court system. The ALI Model Code of Pre-Arraignment Procedure (1975) does not prohibit or restrict the use of photographic identification to situations where photographic identification (as opposed to a corporeal line-up) is "necessary." The comments to section 160.2 of the Model Code (dealing with the conduct of identification procedures) note that, "most courts recognize no ban

on photographic identification when the defendant is in custody and a lineup is feasible." Id., at 440.

In California, the state in which the crime occurred, it is clear that necessity for the use of photographic identification procedures plays no part in the determination of their constitutional validity. People v. Suttle (1979) 90 Cal.App.3d 572, 153 Cal.Rptr. 409.

Our conclusion that the Ninth Circuit was incorrect in holding that necessity for the use of photographic identification procedures enters into the determination of whether their use in a particular case violated a defendant's due process rights is fortified by reference to the nature of the due process interest involved. This Court's cases were aimed at protection

of the defendant's interest in excluding evidence which is especially unreliable. Necessity or lack of necessity for use of a particular pretrial identification procedure simply has no bearing on its reliability and thus should have no place in a determination of the admissibility of subsequent identification evidence.

B. The court of appeals applied an incorrect standard in determining whether there was a substantial likelihood of irreparable mistaken identification.

The Ninth Circuit's approach differs from that of this Court in another way. It not only adds an element [necessity], but also fails to follow the approach first enunciated in Neil v. Biggers and later reaffirmed in Manson v. Brathwaite. Rather, it applies a test established by the United States District Court for the

Eastern District of Missouri in a case decided before Biggers and Manson. Parker v. Swenson, 332 F.Supp. 1225, 1230-1231 (E.D.Mo. 1971) affirmed 459 F.2d 164 (8th Cir. 1972), cert. denied, 409 U.S. 1126. This second part of the Ninth Circuit's "two-part" approach fails to consider two of the five factors set forth by this Court -- the level of certainty demonstrated by the witness at the confrontation and the length of time between the crime and the confrontation. We submit that the application of this test, in lieu of the test set forth in Neil v. Biggers and Manson v. Brathwaite, compounded the error committed by the court in incorporating the concept of "necessity" in its analysis and predictably led it to an incorrect result.

C. Conclusion

This Court has stated that, as a general rule, corporeal identification procedures are normally more accurate than photographic identification procedures. Simmons v. United States, supra, at 386, n. 6. We have no reason to quarrel with this general statement. However it is also true that any identification procedure has some degree of suggestiveness and that the determination of impermissible suggestiveness is not subject to generalities. Photographic identification procedures may be scrupulously fair. A physical line-up may consist of a giant and seven dwarves. Generalities simply do not assist in the resolution of these individual cases.

Since the federal circuits are in conflict as to the appropriate test to be applied in determining whether admission

of identification evidence has violated a defendant's due process rights, we submit that this Court should grant certiorari to resolve this important question, which is certain to recur in innumerable future cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

DATED: November 2, 1981

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Appendix

APPENDIX A

No. 78-2636.

United States Court of Appeals,

Ninth Circuit.

Robert MATA,	)
Petitioner-Appellant,	)
vs.	)
George SUMNER,	)
Respondent-Appellee.	)

Dec. 21, 1979.

Rehearing Denied Jan. 31, 1980.

Before: ELY and SNEED, Circuit Judges, and TAKASUGI,* District Judge.

ELY, Circuit Judge:

Robert Mata ("appellant") appeals from the District Court's denial of his Petition for Writ of Habeas Corpus. The Petition followed the appellant's conviction of murder in a California state

*The Honorable Robert M. Takasugi, United States District Judge for the Central District of California, sitting by designation.

court and his exhaustion of all available state court remedies.

We reverse the District Court's Order upon the basis of our conclusion that state authorities violated rights given to the appellant by the federal Constitution. First, the pre-trial photographic identification procedure employed by state police was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable in-court misidentification of the appellant. Second, the admission of the in-court identification constituted error of constitutional dimension.

FACTS

This case involved a homicide at the medium security prison, C.C.I., Tehachapi, California, on October 19, 1972. The prosecution's case was based chiefly on the theory that the homicide was a result

of feuding between opposing prison factions--the "Mexican Mafia" and the "Nuestra Family." The homicide victim, Leonard Arias, was represented to have been a member of the "Nuestra Family." Prior to being transferred to Tehachapi, Arias had allegedly attacked a member of the "Mexican Mafia" while at another California prison, San Quentin. As a result of this attack, the "Mexican Mafia" had a "contract" out on the life of Arias. The day after his arrival at Tehachapi, Arias was fatally stabbed.

The prosecution alleged that the appellant and co-defendants Gallegos and Vargas approached Arias and began hitting him. Gallegos stabbed Arias, and one of the three defendants pulled the knife out of Arias' back. One witness, Allen attempted to help Arias, but one of the three defendants jabbed at

him, ripping his jacket. Another witness, Almengor, allegedly fought with the appellant, who had a knife.

The facts surrounding the pre-trial photographic identification procedures are set forth below:

October 19, 1972

Almengor was shown several hundred photographs of inmates. He selected eight photographs, making a positive identification of Pete Nunez as the person who did the stabbing, and tentatively identifying inmates Ramirez, Reymundo, and Vargas. He did not identify the appellant as a participant. Almengor changed his "positive" identification of Nunez when prison authorities told him that Nunez had been outside the prison on the day of the killing.

Allen was not shown any photographs on October 19th, since he asserted that he could not make any identification.

October 27, 1972

Almengor and Allen were shown twenty-four photographs of inmates, including photographs of the three defendants. Outisde of Allen's presence, Almengor again tentatively identified the photograph of Vargas. Once again, however, Almengor did not identify the appellant. Moreover, Almengor stated that the photographs were too old and requested more recent ones. Allen was unable to make any identification, and he also complained that the photographs were too old.

October 27-October 30, 1972

A series of updated photographs were taken of the defendants and other inmates, but none of the photographs were useable. The photographs of the three defendants were the only ones taken a second time. The defense asserted that when the

defendants were taken to be photographed, they were led out of the segregation unit in partial view of Almengor and Allen. It is disputed whether Almengor or Allen actually recognized the defendants as the persons who were to be photographed.

October 30, 1972

Almengor and Allen were shown fifteen photographs of inmates. The only updated photographs included were those of the three defendants. Not included in the group of fifteen were the photographs of Ramirez, Reymundo, and Nunez. As indicated, Almengor had previously identified these men as suspects when he had been shown photographs on October 19th. The prosecution's position was that the exclusion occurred because the correctional officers did not consider these inmates as suspects.

In an interview on October 27, 1972,

Almengor had described two of the assailants as having mustaches. Six of the fifteen photographs were of inmates wearing mustaches and prison dress. Three of the six photographs were the updated photographs of the three defendants, while the other three photographs were less than a year old. Although taken at different times, most of the photographs in the line-up were similar in terms of size, color, and pose. All of the inmates pictured were of Mexican descent. From these fifteen photographs, Almengor selected those of the three defendants. As indicated above, Almengor had never, prior to this time, identified the appellant. Allen was then brought in, and while Almengor stood on the other side of the room, Allen likewise identified the three defendants. This was the first time that Allen had made an identification of any of the assailants.

The appellant asserted that Almengor was informed by prison officials that he was a suspect because of the discovery, shortly after the murder, of bloodied clothes that belonged to him. Further, it was not disputed that Almengor had asserted thr' ughout much of the identification process that he could not make a positive identification from photographs. The prosecution conceded that Almengor requested a line-up and that this request was refused. No reason for the refusal was given.

In respect to Allen, appellant pointed to the fact that Allen originally stated that he could make no identification. Appellant also asserted that the California Department of Corrections "reminded" Allen of his upcoming parole date and threatened to transfer him, if he failed to cooperate, to another institution, a facility wherein his life would

be in danger. Finally, appellant asserted that Allen told one Faulkner, a private investigator for the appellant, that (1) the incident only lasted a few seconds, and Allen did not get a a good enough look at any of the assailants to identify them; (2) throughout the investigation Allen had maintained that he could not identify the assailants, and that he would take a lie detector test to substantiate this; (3) Allen assumed the three defendants must have been the ones who committed the murder because he saw them being taken to be photographed the second time; (4) Allen was due for parole and was under pressure from the Department of Corrections to make an identification.

The prosecution contended that the appearance of the appellant in the updated photograph was significantly

different than the original photograph which had been taken three to eight months earlier. Furthermore, the prosecution relied upon Allen's testimony that he had feigned an inability to make an identification because he was attempting to avoid involvement. In addition, the prosecution contended that Allen denied that correctional officers attempted to influence him and repudiated much of what Private Investigator Faulkner had testified that Allen had told him earlier. Finally, the prosecution pointed to evidence that Allen and Almengor did not ascertain the identity of who was being photographed a second time and thus did not "correctly select" the defendants on this basis.

DISCUSSION

I.

The presence of counsel is not constitutionally required during a pre-trial

photographic display for purposes of suspect identification. United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973). Such identification, however, may be challenged as violative of due process when the procedure is unnecessarily suggestive and conducive to irreparable mistaken identification. Stovall v. Denno, 388 U.S. 293, 301-02, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The validity of a photographic identification is to be evaluated in light of the particular facts and surrounding circumstances of each case. Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); United States v. Calhoun, 542 F.2d 1984, 1104 (9th Cir. 1976), cert.denied, 429 U.S. 1064, 97 S.Ct. 792, 50 L.Ed.2d 781 (1977). A conviction "based on eyewitness identification at trial following

a pretrial identification by photograph will be set aside . . . [as a denial of due process] only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, supra, 390 U.S. at 384, 88 S.Ct. at 971.

Our Circuit has generally followed a two-part approach in determining the admissibility of an in-court identification. See, e.g., United States v. Valdivia, 492 F.2d 199, 210 (9th Cir. 1973), cert.denied, 416 U.S. 940, 94 S.Ct. 157, 58 L.Ed.2d 155 (1978). First, the necessity of the photographic identification procedure is considered. Id. In this case, appellant was an inmate at the Tehachapi facility and was placed in segregation after the stabbing. It seems

quite clear, therefore, that there was no necessity here to use photographic procedures. While lack of necessity is not a per se ground for rejection of the identification, see United States v. Calhoun, supra, 542 F.2d at 1104; United States v. Valdivia, supra, 492 F.2d at 210, we have consistently held that necessity is an important factor to be considered in judging the validity of the identification procedures. See United States v. Peele, 574 F.2d 489, 490 (9th Cir. 1978); United States v. Calhoun, supra, 542 F.2d at 1104; United States v. Pheaster, 544 F.2d 353, 370 (9th Cir. 1976), cert.denied, 429 U.S. 1099, 97 S.Ct. 1118, 51 L.Ed.2d 546 (1977); United States v. Valdivia, supra, 492 F.2d at 210; United States v. Baxter, 492 F.2d 150, 171 (9th Cir. 1973), cert.denied, 414 U.S. 801, 94 S.Ct. 16, 38 L.Ed.2d 38 (1974).

The second standard or tier of our court's traditional approach is "whether there was a very substantial likelihood of irreparable misidentification." United States v. Valdivia, supra, 492 F.2d at 210. Unnecessary suggestibility alone does not require exclusion of the subsequent identification. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed 2d 140 (1977). "It is the likelihood of misidentification which violates a defendant's right to due process. . . ." Neil v. Biggers, 409 U.S. 188, 198, 93 S.Ct. 375, 381-382, 34 L.Ed.2d 401 (1972). In other terms, "the focus is on the reliability of the witnesses' identification rather than on the flaws in the pretrial identification procedures." United States v. Barron, 575 F.2d 752, 754 (9th Cir. 1978). Several factors have been listed as relevant in the evaluation of the likelihood of misidentification:

> (1) the length of time and the conditions under which a witness was able to observe the perpetrator during the commission of the crime . . ., (2) the similarity of the description given by a witness immediately after the crime to the physical characteristics of the individual he subsequently identifies, (3) conduct on the part of the police tending to focus attention on a particular subject, and (4) presence of other witnesses at the time of the improper identification and the possible prejudicial influence of one witness' opinion on another's recollection. See Parker v. Swenson, 332 F.Supp.1225, 1230-1231 (E.D.Mo. 1971).

United States v. Valdivia, supra, 492 F.2d at 210. See also United States v. Calhoun, supra, 542 F.2d at 1104;

United States v. Crawford, supra, 576 F.2d at 797.

In applying the facts of this case to well established standards, it is obvious that there was a grave likelihood of irreparable misidentification.

According to their testimony, witnesses Almengor and Allen observed the stabbing and actually fought with appellant and one of the co-defenda;nts. This would have at least provided an opportunity for the witnesses to observe the perpetrators of the crime. On the other hand, the violence accompanying the incident and the threat presented by the knife would have, quite likely, diverted the witnesses' attention.

On October 27, 1972, Almengor told investigating authorities that two of the assailants were dark complexioned and wore moustaches, while the other assailant looked like "an Indian dude." The

The appellant is of Mexican descent and wore a moustache at the time of the homicide.

Yet, the descriptions of the assailants were clearly not detailed descriptions. Cf. Neil v. Biggers, supra, 409 U.S. at 200, 93 S.Ct.375 (description included assailant's approximate age, height, weight, complexion, skin texture, build and voice).

As for conduct on the part of the authorities "tending to focus attention on a particular subject," it should first be noted that there was not one, but three different sessions wherein Almengor and Allen were shown photographs. As stated in United States v. Higginbotham, 539 F.2d 17, 23 (9th Cir. 1976), wherein the witness was given a photographic display twice:

> While the repeated showing to a witness of photographic displays for the purpose of identification presents opportunities for abuse and due process problems, when it is shown that the witness was equivocal on the first selection and became firm on a later showing, that rule should not be applied where the witness has been consistently firm.

See also United States v. Cook, 608 F.2d 1175 at 1178-79 (9th Cir.June 29, 1979) ("As with all photographic identification procedures, there is a possibility that the prior photo array tainted this later identification.").

Here, Almengor was not merely "equivocal" on the first selection. He selected photos of three individuals whom the prosecution asserts were not involved at all. Allen would not even look at the

photos because he said he could not make an identification. The two witnesses made the "correct" selections on the third time around, and only after (1) Almengor's request for a line-up had been refused[1], (2) considerable pressure from both the prison officers and opposing prison factions had admittedly been brought to bear on both witnesses, (3) prior "mistaken" selections had been removed, (4) the number of photos had been drastically reduced; and (5) new photos of appellant and co-defendants (and only of these three) had been

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1. As indicated above, the state authorities offered no reason why Almengor's request for a line-up was denied. Particularly in light of the witnesses' own complaints about the photographic identification procedure, we can only infer that the refusal stemmed from the reluctance of the prison officials to provide appellant with the assistance of counsel which would be required in a line-up procedure.

substituted in the array.[2/]

The prosecution argued that the changed appearance of the appellant in the updated photograph accounted for the sudden ability of Almengor and Allen positively to identify the appellant on October 30th. While we have looked at the photographic exhibits and do agree that there is some change in appearance, this fact must be balanced against the totality of circumstances. Based upon the lack of necessity, the diversion of the witnesses' attention at the time the crime was committed, the hazy and very general description of the appellant by

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2. Cf. Simmons v. United States, supra, 390 U.S. at 383, 88 S.Ct. at 971 (The danger of an erroneous identification by a witness "will be increased if the police . . . show the [the witness] the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized.").

Almengor, and the inescapable focusing of attention upon the appellant by the investigating authorities, we are driven to the conclusion that the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Due process of law cannot be predicated on a systematic plan by prison officers to twist a photographic identification procedure in a manner calculated to obtain an identification of one they suspect.[3/]

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3. Having carefully considered the dissenting opinion, the majority deems it unnecessary to comment on that opinion, except for one portion thereof. The portion reads:

> "Pressure was indispensable in the circumstances of this case if the crime was to be solved reasonably quickly. I repeat, prison officials must operate in a humane manner but also in a fashion that takes into account the realities of prison

(Footnote 3 continued on next page)

II.

From our view of the record, including the evidence introduced against the appellant, it is clear to us that the in-court identifications by Almengor and

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(Footnote 3 continued)

> environment. The officials in this case, in my opinion, merely did what we as citizens demand of them, i.e., protect the inmates by apprehending those who recently had preyed upon one of them."

The record before us indicates, with unmistakable clarity, that the photographic identification procedures in question were not employed to "protect the inmates by apprehending those who recently had preyed upon them." In fact, the appellant had already been quickly apprehended and placed in segregation after the stabbing had occurred. Therefore, the impermissible procedures were utilized so as to assemble incriminating evidence against the appellant in order that the crime be more quickly "solved."

In the consideration of such a fundamental right as due process, there are, of course, much more treasured values than mere speed and efficiency. See Wolff v. McDonnell, 418 U.S. 539, 583, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)

(Footnote 3 continued on next page)

Allen constituted evidence that was of exceptional importance to the prosecution in its achievement of the appellant's conviction. Therefore, we cannot hold that the error in allowing these identifications was harmless beyond a reasonable doubt. Chapman v. California,

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(Footnote 3 continued)

(Marshall, J., dissenting); Fuentes v. Shevin, 407 U.S. 67, 90-91 n.22, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1977). We cannot remain oblivious to the danger, a danger of the severest gravity, that investigating officials, in an effort quickly to solve a crime, may exert such coercive tactics as to lead to the mistaken identification of an innocent individual. Moreover, in the context of prison environment, the guarantee of due process rights is no less important than is that guarantee to society at large. All law abiding citizens share the desire that all crimes be solved with reasonable speed, but speed, in and of itself, cannot justify the infringement of basic constitutional rights. And, it is well established, of course, that a prisoner does not shed his basic constitutional protections when he enters an American prison. See Finney v. Arkansas Board of Corrections, 505 F.2d 194, 211 (8th Cir. 1974) and cases cited therein.

386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); United States v. Lopez, 575 F.2d 681, 685 (9th Cir. 1978). See also Wilson v. Anderson, 379 F.2d 330, 335-37 (9th Cir. 1967) (Ely, J., dissenting), rev'd per curiam, Anderson v. Nelson, 390 U.S. 523, 88 S.Ct. 1133, 20 L.Ed.2d 81 (1968). Accordingly, the challenged Order of the District Court is reversed. Upon remand, the District Court will hold the Petition in abeyance for a period of ninety days, within which time California's prosecutors may, if they so choose, initiate a new trial against the appellant, a trial in which prosecutorial evidence barred by he federal Constitution will not be introduced.

REVERSED and REMANDED, with directions.

SNEED, Circuit Judge (dissenting):

I respectfully dissent.

The majority concludes that there was "a systematic plan by prison officers to twist a photographic identification procedure in a manner calculated to obtain an identification of one they suspect"; that there was no necessity to use photographic identification procedures; and that the procedures employed here created a grave likelihood of irreparable misidentification. Fortified by my examination of the photographs employed on October 27, 1972 and October 30, 1972 and the fact that, leaving aside the direct appeal process, three courts of the State of California (Superior Court of Marin County, Court of Appeal, Fifth Appellate District, and Supreme Court of California) and one federal court (District Court, Northern

District of California) have failed to discern the "systematic plan" and to reach the conclusions so easily arrived at by the majority, I conclude that the procedures employed did not contravene the Simmons test as interpreted by this circuit.

In addition, I suggest that the application of the Simmons test in habeas corpus proceedings should be somewhat less rigorous than is the case in direct appeals from federal convictions. That is, the likelihood of irreparable misidentification should be sufficiently clear and convincing in habeas proceedings to require a setting aside of the conviction to prevent manifest injustice. This position involves recognition that a vigorous application of Simmons in the direct appeal setting rests, in part, on our supervisory

powers rather than exclusively on the command of the Due Process Clause of the Fifth Amendment.

I. THE SIMMONS TEST AS USED ON DIRECT APPEAL

In applying Simmons as it would be on a direct appeal, the majority concludes much too easily that there was no necessity in this case to use photographic identification procedures. I disagree. The prison setting of the crime for which appellant was convicted and the investigation thereafter by prison officials in my opinion dictate the use of photographic identification procedures. Apparently the majority insists as a matter of constitutional law that there be employed lineups of a large group of inmates, with each suspect, or more likely a substantial group of inmates, which would include

the suspects, suitably equipped with counsel, in lieu of photographic identification procedures. See p. 759 n.1. To state the requirement reveals its impracticability. Moreover, it would impose heavy demands on the staff, strain employee relations, and expose the inmates to increased risks of bodily harm.

The prison world is unique. It differs enormously even from the precinct stationhouse and police headquarters. A "code of silence" strengthened by taboos against "ratting" and a pervasive fear of retaliation are characteristics of the prison social order. In this environment prison administrators and guards must function. Administrators are responsible for protecting prisoners in their custody and may be held liable for a failure to provide such protection. See, e.g., Sostre v. McGinnis, 442 F.2d 178, 205 (2d Cir.

1971), cert.denied, 404 U.S. 1049, 92 S.Ct. 7a9, 30 L.Ed.2d 740 (1972); Bennett, Who Wants To Be Warden?, 1 New England J.Prison L. 69, 69-70 (1974). Guards, directly responsible for prison order and security, jealously husband their stock of authority and seek to avoid any confrontation that will deplete that stock. See National Institute of Law Enforcement and Criminal Justice, Prison Employee Unionism: The Impact on Correctional Administration and Programs 24-25 (1978). To require the type of lineup the majority envisions in this setting is to insist upon jeopardizing the security and safety of all as the price of securing the constitutional protection that the majority holds appellant is entitled. We should be reluctant to fashion constitutional doctrines whose price is so dear.

In any event, necessity, or the lack of it, constitutes but part of the Simmons test. United States v. Crawford, 576 F.2d 794, 797-8 (9th Cir.), cert. denied, 439 U.S. 851, 99 S.Ct. 157, 58 L.Ed.2d 155 (1978). The strength of the majority's position rests on the exertion of pressure by prison authorities on Almengor and Allen and the use of three photographic spreads in the manner described. Pressure was indispensable in the circumstances of this case if the crime was to be solved reasonably quickly. I repeat, prison officials must operate in a humane manner but also in a fashion that that takes into account the realities of prison environment. The officials in this case, in my opinion, merely did what we as citizens demand of them, i.e., protect the inmates by apprehending those who recently had preyed upon one of them.

The record of this case does not include the several hundred photographs shown to Almengor on October 19, 1972. The spreads of October 27 and 30, 1972, are included, however. So different is the appellant's photographs used in the October 27 spread from that of October 30 that it is difficult to accept the fact that the appellant appeared in the October 27 spread at all. Nonetheless, I must accept that fact because both appellant and appellee agree that the appellant's photograph did appear in the October 27 spread. It remains true, however, that any failure to select the appellant's photograph in the October 27 spread may be attributable to the fact that it bore little resemblance to the appellant's appearance at the time of the murder of Arias.

The spreads of October 27 and 30, therefore, are not impermissibly suggestive on their face. Nor are they made so by the absence of the photographs of Ramirez, Reymundo, and Nunez. The range of choice available to Almengor and Allen remained large. Also, contrary to the majority's characterization is the weight that must be given to Almengor's description of the assailants of Arias and the consistency with which Vargas, one of the assailants, was identified. Admittedly the uncertainty surrounding Allen's motivations prior to his identification of the appellant compels us to review carefully the way in which the spreads were used. Allen's behavior, however, is consistent with an effort to avoid entanglement until his identification would yield the largest possible return to him. While such an

attitude is not particularly noble, it is precisely the state of mind most prisoners would have under similar circumstances. In any event, I find it impossible to attribute his identification of appellant's photograph to an impermissibly suggestive use of photographic spreads. That Allen was subjected to official and unofficial pressures I do not doubt; but the Simmons rule should not be distorted to enable us to condemn on constitutional grounds the inescapable use of such pressures in an investigation of a murder in a prison setting. Interpretations of our supervisorial powers or of the Constitution which ignore the realities of the environment within which they could function bring discredit to both the courts and the Constitution.

II. COLLATERAL REVIEW AND SIMMONS

Should I be wrong about the application of Simmons to the facts of this case were it before us on direct appeal, I maintain that Simmons should be applied in habeas corpus proceedings so as to overturn convictions only in the case where clear and convincing evidence demonstrates that reversal is required to prevent manifest injustice. To so limit Simmons in habeas proceedings is in keeping with the scope the remedy historically has been given. See Stone v. Powell, 428 U.S. 465, 475, 96 S.Ct.3037, 49 L.Ed.2d 1067 (1976); Oaks, Legal History in the High Court--Habeas Corpus, 64 Mich.L.Rev. 451 (1966). Although the scope of habeas relief has been expanded, it has remained a remedy for exceptional cases: "It is of the historical essence of habeas corpus that it lies to test

proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void." Fay v. Noia, 372 U.S. 391, 423, 83 S.Ct.822, 849 9 L.Ed.2d 837 (1963).

To apply Simmons in habeas proceedings to instances of manifest injustice requires recognition that "impermissible suggestiveness" for purposes of collateral review of state convictions rests on an interpretation of due process, assured by the Fifth and Fourteenth Amendments, that may not exhaust the full reach of Simmons which, it must be remembered, arose from a direct appeal from a federal conviction. Mr. Justice Harlan, speaking for the Court, recognized that, in fashioning the Simmons standard, supervisorial powers, rather than constitutional commands, also could be the source of the Court's authority.

390 U.S. at 384, 88 S.Ct. 967. Limitation of Simmons, in collateral review to "suggestiveness" so flagrant as to result in manifest injustice merely recognizes that the dictates of due process are somewhat less far reaching than are the supervisorial powers of federal courts over federal law enforcement officials. The existence of this difference appears to me to be neither unreasonable nor inconsistent with Simmons. It must be admitted that the distinction I suggest has not been utilized by the Supreme Court. See Neil v. Biggers, 409 U.S. 188, 196-09, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); Manson v. Brathwaite, 432 U.S. 98, 121-22, 97 S.Ct. 2243, 53 L.Ec.2d 140 (1977) (J. Marshall dissenting); Pulaski, Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection, 26 Stan.L.Rev. 1097, 1106-09

(1974); but see Comment, Photographic Identification: The Hidden Persuader, 56 Iowa L.Rev. 408, 425, 26 (1970). Nor has this circuit employed it. See United States v. Allison, 414 F.2d 407, 409 (9th Cir.), cert.denied, 396 U.S. 968, 90 S.Ct. 449, 24 L.Ed.2d 433 (1969); United States v. Baxter, 492 F.2d 150, 170-171 (9th Cir.), cert.dismissed, 414 U.S. 801, 94 S.Ct. 16, 38 L.Ed.2d 38 (1973), cert.denied, 416 U.S. 940, 94 S.Ct. 1945, 40 L.Ed.2d 292 (1974); United States v. Jones, 512 F.2d 347, 351 (9th Cir. 1975); cf. United States v. King, 433 F.2d 937, 938 (9th Cir. 1975), cert.denied, 402 U.S. 976, 91 S.Ct. 1681, 29 L.Ed.2d 142 (1971) (the court quoted Mr. Justice Harlan's opinion that the Supreme Court has both supervisory and constitutional powers of review).

Also, Stone v. Powell, supra, while useful as an analogy, does not precisely justify my position because there the evidence admitted in the state proceedings in no way could be thought to have been "created" by improper official conduct. Its admissibility might be barred because of an improper search and seizure, but its genuineness and probity could not be questioned. Here the situation is different. In-court identifications carry some taint whenever any non-frivolous issue regarding the use of photographic spreads is raised. The taint, moreover, puts in issue the truth of the in-court identification. It follows, therefore, that the balancing process employed by the Court in Stone v. Powell, in which the utility of the exclusionary rule is weighed against the costs of extending it to

collateral review, is not applicable here. A different approach must be employed, one in which the constitutional standard employed in collateral review is somewhat less demanding than the supervisorial standard employed on direct appeal.

Notwithstanding the inapplicability of Stone v. Powell's balancing process, it remains true that its emphasis upon the opportunity for full and fair litigation in the state courts is equally applicable here. 428 U.S. at 494, 96 S.Ct. 3037. This opportunity to litigate an issue as imprecise as "impermissible suggestiveness" in the state courts frequently is redundant. Repetitive collateral review employing a standard so amorphous more resembles a game of chance than it does the wide administration of criminal justice. To so employ the

Great Writ is to corrupt, not enhance it. See Sneckloth v. Bustamonte, 412 U.S. 218, 275, 93 S.Ct. 2041, 36 L.Ed.2d 854 (Powell, J., concurring). I would affirm the district court.

APPENDIX B

No. 78-2636.

United States Court of Appeals,

Ninth Circuit.

Robert MATA,	)
	)
Petitioner/Appellant,	)
	)
vs.	)
	)
George SUMNER,	)
	)
Respondent/Appellee.	)

[Filed Jan. 31, 1980]

Before: ELY and SNEED, Circuit Judges, and TAKASUGI,* District Judge.

Of the judges constituting the panel originally concerned with the subject case (Ely, Sneed and Takasugi), Judges Ely and Takasugi have voted to deny the Petition for Rehearing. Judge Sneed would grant panel rehearing. Judge

*The Honorable Robert M. Takasugi, United States District Judge for the Central District of California, sitting by designation.

Sneed has voted to reject the suggestion for rehearing en banc, and Judges Ely and Takasugi have recommended that the suggestion be rejected.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Petition for Rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX C

In the Court of Appeal
State of California

Fifth Appellate District

5 Crim. 1735
(Sup.Ct.No. 15771)

The People,	)
Plaintiff and Respondent,	)
vs.	)
Salvadore Vargas, David Gallegos, and Robert Mata	)
Defendants and Appellants.	)

[Filed Aug. 4, 1975]

OPINION

APPEAL From a judgment of the Superior Court of Kern County. P. R. Borton, Marvin E. Ferguson and John M. Nairn, Judges. Affirmed.

Douglas J. Morgan, under appointment by the Court of Appeal, for defendant and appellant Salvadore Vargas.

C. Michael Farmer, under appointment by the Court of Appeal, for defendant and appellant Salvadore Vargas.

Jim D. Mills, under appointment by the Court of Appeal, for defendant and appellant Robert Mata.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, Arnold O. Overoye, Joel Carey and Anthony L. Dicce, Deputy Attorneys General for plaintiff and respondent.

Appellants herein, Salvadore Vargas, David Gallegos and Robert Mata, were tried jointly and were found guilty of murder in the first degree. All three were sentenced to state prison for the term prescribed by law. All three filed separate appeals, the contentions in which are treated here together.

FACTS

On October 19, 1972, inmate Leonard Arias was stabbed to death in a dormitory

at the California Correctional Institution at Tehachapi. At approximately 1:30 p.m. of that day, Arias, one Rigoberto Almengor and one Jay Allen, all inmates of the institution, were drinking coffee and talking near Allen's bunk in Dormitory Eight. A call over the institution's loud speaker ordered all new arrivals to report to the laundry room. Arias had just arrived at the institution from San Quentin Prison the previous day and the three men thereupon proceeded to the laundry room.

On the way to the laundry room they passed three men who were standing by the bulletin board. These three men then turned and attacked the victim Arias. During the attack, Arias was stabbed with a knife several times, causing his death.

Each of the appellants denies partaking in the attack and subsequent killing; and each produced evidence tending to show that he was at another place in the prison at the time of the incident in question.

Multiple issues are raised by the respective appellants and assigned as prejudicial error requiring reversal of the judgment.

I. The Photographic Lineup Procedure.

Both appellants Gallegos and Mata contend that there were prejudicial errors in the pretrial identification of them by certain prosecution witnesses.

Three inmate witnesses testified that they saw the stabbing take place. All three -- Childress, Almengor, and Allen -- identified all three defendants; but their testimony is attacked by appellants Gallegos and Mata on the basis of

claimed improper pretrial photographic identification procedures. The witnesses were shown a number of photographs of Tehachapi inmates in an attempt to identify the slayers. Almengor was interviewed and shown photos on October 19, 1972, the day of the incident. He made a possible identification of appellant Vargas, but made possible misidentifications of the other two participants. On October 30, 1972, more recent photos were presented to Almengor and he identified all the appellants. On October 27, 1972, Allen was shown photographs but stated he could not make an identification because the photographs were old. On October 30, 1972, more photos were presented to Allen and he identified all three appellants. On that date Childress also selected all three appellants from photographs shown to him.

Appellants argue that the witnesses Almengor and Allen were housed in the same segregation unit with appellants, that they were aware that appellants were removed from the segregation unit to have their pictures taken and that this makes their identification inadmissible. But they make no showing, and the record supports none, that the witnesses were in fact influenced in their identification by this action of the investigating officers.

It is established that the safeguards set forth in United States v. Wade, 388 U.S. 218 and Gilbert v. California, 388 U.S. 263 do not apply to pretrial photographic identification of a suspect. (People v. Lawrence, 4 Cal.3d 273.)

The Lawrence case followed the decision by the United States Supreme Court in Simmons v. United States, 390 U.S. 377,

which reached a similar result. Both courts reasoned that particularly where the photographs from which the witness made his identification were preserved and available at trial, as was the situation in the case at bench, counsel for the accused can easily reveal the possibility of prejudice by using the photographs in cross-examination. (Simmons v. United States, supra, 390 U.S. at 384; People v. Lawrence, supra, 4 Cal.3d at 278-279.) Both courts have determined that each case must be considered on its own facts, and that a violation of due process occurs and a conviction will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. (See Simmons v. United States, supra, 390 U.S. at 384;

People v. Lawrence, supra, 4 Cal.3d at 280.)

Reviewing the facts of the present case to determine if the particular photographic identification procedure used contained the proscribed suggestive characteristics, we first find that the photographs were available for cross-examination purposes at the trial. We further find that there is no showing of influence by the investigating officers: that the witnesses had an adequate opportunity to view the crime; and that their descriptions are accurate. The circumstances thus indicate the inherent fairness of the procedure, and we find no error in the admission of the identification evidence.

II. Denial of Discovery

All three appellants contend that the trial court abused its discretion in denying a motion for additional discovery.

At the commencement of the trial, counsel for the defendant Gallegos, Mr. Simrin, renewed a motion for discovery which had been made before another department of the court previously, and had been continued generally for hearing before the trial judge. This motion had been instituted by a notice in writing, coupled with the declaration of the attorney, and requested information from the Department of Corrections concerning (1) records and reports concerning the membership or non-membership of one Ortega, a prospective prosecution witness, in the Mexican Mafia; and (2) records and reports concerning the membership or non-membership of the three defendants; and (3) a list of all those persons alleged to have been members of the Mexican Mafia as of October 19, 1972. Counsel for the other defendants joined in the motion.

Subsequently, at an in-chambers conference prior to trial, the motion was limited to records concerning the witness Ortega; all counsel agreeing that if this witness were not called there would be no reason to urge the motion.

Thereafter, the desired files of the Department of Corrections were obtained, and an in camera hearing was held wherein the material was found to be of a privileged nature and it was further found by the judge that the privilege outweighed any probative value the evidence may have to the defense. Although the judge did disclose certain information in the file to counsel for the defendants, he found that the balance of the file was privileged and in any event contained no further material of any probative value to the defendants. After the court had announced its decision, counsel for one

of the defendants moved for further discovery on the file. The court denied the motion, and refused to permit counsel to state a reason for the further discovery for the record.

Absent some governmental requirement that information be kept confidential, the accused in a criminal trial is generally entitled to have access to all evidence in the hands of the prosecution or in possession of other agencies which are part of the criminal justice system and which can throw light on the issues in the case. (People v. Riser, 47 Cal. 2d 566; Engstrom v. Superior Court, 20 Cal.App.3d 240.) It is therefore necessary to inquire whether the type of information sought to be discovered in the instant case is confidential,

official information.[1/]

Section 1040 of the Evidence Code governs the disclosure of "official information". It provides, in part, as follows:

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1. We are not unmindful of the cases of Procunier v. Superior Court (Losoya), 35 Cal.App.3d 207 and Procunier v. Superior Court (Herth), 35 Cal.App.3d 211, which hold that almost identical information was absolutely privileged under the provisions of Government Code section 6255.

These decisions, however, ignore section 6260 of the Government Code, which provides:

> "The provisions of this chapter shall not be deemed in any manner to affect the status of judicial records as it existed immediately prior to the effective date of this section, nor to affect the rights of litigants, including parties to administrative proceedings, under the laws of discovery of this state." (Emphasis added.)

It thus appears that section 6255 of the Government Code is not applicable to these proceedings, and for this reason we do not feel bound by these decisions.

"(a) As used in this section 'official information' means information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

"(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:

"* * *

"(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the

necessity for disclosure in the interest of justice . . ."

A provision for determination of a claim of privilege by the court is set forth in section 915 of the Evidence Code. This section provides as follows:

"(a) Subject to subdivision (b), the presiding officer may not require disclosure of information claimed to be privileged under this division in order to rule on the claim of privilege.

"(b) When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) or under Section 1060 (trade secret) and is unable to do so without requiring disclosure of the information claimed to be privileged, the court

may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither he nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers."

Thus, provision is made for an *in camera* hearing before the judge alone, with only the objecting party present, when the claim of privilege is raised.

Evidence Code section 1042(a) provides for sanctions upon the public entity invoking the privilege where necessary. It states as follows:

> "(a) Except where disclosure is forbidden by an act of the Congress of the United States, if a claim of privilege under this article by the state or a public entity in this state is sustained in a criminal proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material."

The Supreme Court has pointed out, in Pitchess v. Superior Court (Echeveria), 11 Cal.3d 531, 540, the results of the legislative enactment in

the Evidence Code, as follows:

"Evidence Code section 1040, therefore, represents the exclusive means by which a public entity may assert a claim of governmental privilege based on the necessity for secrecy. Evidence Code section 1042, subdivision (a), in turn, codifies the due process demand recognized by the United States Supreme Court that the prosecution cannot commence criminal proceedings 'and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.' [Citations omitted.] In concert, the two provisions create an orderly and fair procedure designed to safeguard the legitimate interests of both the government and criminal defendants."

It is thus clear that there should be an in camera hearing wherein the trial judge examines the requested evidence when the privilege is invoked.

There is, however, a conflict amongst the cases as to whether or not an adversary hearing is necessary after the in camera examination of the evidence. In People v. Superior Court (Biggs) 19 Cal.App.3d 522, in a well reasoned opinion the court held that the in camera hearing provided by section 915(b) is merely a preliminary inquiry to acquaint the judge with the public necessity of confidentiality; that thereafter, the other Evidence Code sections requiring a preliminary determination of the foundational facts come into play, and that an adversary hearing should be held outside the presence of the jury to determine the necessity of the defendant for the

information and the judge should then balance such necessity against the public necessity of confidentiality. At such hearing, the court points out, consideration of alternative evidence offered by the state could be given, and the needs of the defendant might even be satisfied in whole or part without destroying the confidentiality of the files.

In People v. Woolman, 40 Cal.App.3d 652, the court took a contrary view, referring to the language of Biggs, supra, as dicta and indicating the court's opinion that such a procedure would destroy the privilege the hearing is designed to protect. The court held nothing more than an in camera examination of the evidence is required.

Clearly there was no error here if we follow the precepts of Woolman.

We also find that in Biggs the court states (page 532):

> "In weighing the defendant's need, the court was not to pass upon the veracity of his claim, but only to ascertain if a reasonable possibility existed that the requested information might exonerate him."

In the instant case, it is clear that the sole purpose of the requested information was in connection with the testimony of the witness, Ortega.[2/]

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2. At the commencement of the trial, the following colloquy took place between counsel for the defendant Gallegos, who made the original motions, and the court:

> "* * *
>
> "THE COURT: Let me interrupt you for a moment. I am making the statement not as fact, but to elicit information if it is inaccurate. This whole matter turns really over a witness -- Carlow Martin Orgeta --
>
> "Mr. Simrin: Correct.

(Footnote 2 continued on next page)

Thus the only purpose of the evidence could have been for impeachment of one witness; in Biggs, the purpose was to exculpate the defendant by showing that at the time of the alleged offense, the defendant was acting as an informant and was an active undercover operator for the Bureau of Narcotics Enforcement.

It is obvious that under any interpretation of the facts, the required records in this case did not bear on the

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(Footnote 2 continued)

> "THE COURT: Well, if that witness were not called, then there is really no serious reason for you to urge your motion.
>
> "Mr. Simrin: That is correct. And if the witness is not called, on behalf of Defendant Gallegos, I would withdraw my motion.
>
> "THE COURT: That's what I gather from your documents. I want to be sure I am correct.
>
> "* * *"

issue of guilt or innocence, but only on the impeachment of a single witness. Therefore, even under the rule enunciated in Biggs, there is no error requiring a reversal here.

Furthermore, the evidence in the instant case is overwhelming, with several eye witnesses as well as physical evidence pointing to the guilt of the defendants. Any error was therefore harmless. (Chapman v. California, 386 U.S. 18; People v. Stout, 66 Cal.2d 184).

III. The Aranda Rule

Appellants Mata and Vargas claim error in permitting into evidence the testimony of one Carlos Ortega concerning a conversation with their codefendant Gallegos. In this testimony Gallegos referred to "we", "they", and "them", presumably meaning Mata and Vargas as well as himself, in connection

with various aspects of the stabbing. Later Gallegos wrote a note to Ortega saying that they did their job and took pride in themselves; here Gallegos allegedly mentioned Mata and Vargas by name.

No admonition restricting this testimony to the defendant Gallegos was given by the trial judge and no cautionary instruction was given the jury that testimony could be used against that defendant only.

People v. Aranda, 63 Cal.2d 518, 530, established the rule that when the prosecution proposes to introduce into evidence an extrajudicial statement of one defendant that implicates a codefendant, the trial court may either (1) permit a joint trial if deletions are made as to all implications of the codefendant; or (2) grant a severance of trials;

or (3) exclude the testimony. However, it has subsequently been made clear by the cases that the failure to object and assert one's Aranda rights at trial constitutes a waiver of those rights. People v. McGautha, 70 Cal.2d 770, 785; People v. Terry, 38 Cal.App.3d 432, 443.

In the present case, the only objections to Mr. Ortega's testimony were upon grounds other than Aranda violations. Thus, appellants have waived any Aranda rights they may have possessed.

Furthermore, it appears that any adverse implications of these extra-judicial statements were ambiguous at best. Thus, even if appellants had preserved their rights on appeal by virtue of a timely objection, it is questionable whether the provisions of Aranda would be applicable. And even if Aranda did apply, the evidence so overwhelmingly

pointed to appellants' guilt, that any error would be harmless. Harrington v. California, 395 U.S. 250, 252-254 (1969); Chapman v. California, 386 U.S. 18, 24 (1967); People v. Epps, 34 Cal.App.3d 146.

We accordingly find no reversible error here.

IV. Failure to Instruct on Statements of Coconspirator.

The statements made by appellant Gallegos (hereinbefore referred to) were admitted on representations of the prosecuting attorney that a conspiracy existed.

Appellants Vargas and Mata contend that in admitting into evidence these statements as an exception to the hearsay rule, the court should have instructed the jury on the law pertaining to the testimony of a coconspirator, sua sponte. No such instructions were requested by appellants at the trial.

Appellants contend that the giving of the appropriate conspiracy instructions would have required the jury to determine whether there was in fact a conspiracy and that appellant was a member of it before the jury could consider the incriminating statements by codefendants to implicate appellant; they further contend that existence of a conspiracy is a preliminary fact that must be found by the trial court before statements made during such conspiracy are admissible. (Evidence Code section 403; People v. Goldberg, 152 Cal.App.2d 562.)

But appellants have made no showing that a sua sponte instruction is required. Even in the analogous situation involving the duty to instruct as to the utilization of accomplice testimony, not all failures to so instruct

constitute reversible error (People v. Gordon, 10 Cal.3d 460, 470-473). In such case a miscarriage of justice should be declared only when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to appellants would have been reached in the absence of error. (People v. Gordon, supra, at 470.)

In this case, other evidence sufficiently pointed to the guilt of all three appellants. Eyewitness testimony placed all of the appellants at the scene of the murder and participating in it. Physical evidence, including gloves, a knife, and a jacket with blood on it were found. Statements of various defendants were included in the testimony. After an examination of the entire cause, including the evidence, the court is of the opinion

that it is not reasonably probable that a result more favorable to appellants would have been reached had the court given the conspiracy instruction.

Thus any failure on the part of the trial court to instruct sua sponte did not substantially prejudice appellants and was not reversible error.

V. Claims of Error in Admission of Evidence.

Various alleged errors in the admission of evidence are cited as gounds for reversal. Appellant Gallegos claims error in the receipt of evidence relating to the Mexican Mafia and Nuestra Familia was prejudicial. He concedes that evidence relating to the existence of these two prison groups was proper; he contends, however, that the trial court committed reversible error in permitting testimony as to activities of

these organizations relating to acts of violence occurring at other institutions in which appellant was not involved.

The activities of the rival inmate factions were the basis of showing motive in the prosecution's case. In connection with these activities, it was within the sound discretion of the trial court to admit evidence of the nature of the group and the nature of their activities in general in institutions; absent this latter evidence, testimony as to their existence would be meaningless. The admission of such evidence being within the sound discretion of the trial court, it will not be disturbed on appeal absent a showing of abuse of such discretion. (People v. Archerd, 3 Cal.3d 615.)

Appellant Mata contends that the trial court erred in admitting the hearsay evidence of one Albert Mills, who

testified as to statements another witness, inmate Childress, made prior to trial concerning the fact that he had witnessed a killing and feared for his life. Immediately thereafter Childress identified the defendants as the perpetrators from photographs. Evidence of such a statement was admitted to corroborate identification at the trial, and also as independent evidence of identification at the trial, and also as independent evidence of identification. This was proper pursuant to Evidence Code section 1238.[3/] (People v. Gould, 54 Cal.2d 621, 626; People v. Imbler, 57 Cal.2d 711, 716.)

---

3. Evidence Code section 1238 provides:

> "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have

(Footnote continued on next page)

VI. Misconduct of Prosecutor.

Appellant Mata contends that the prosecuting attorney was guilty of prejudicial misconduct in asking the witness Schoo on cross-examination, "Isn't it a fact that you used to carry his shank for him?" Schoo was an alibi witness for the defendant Mata. No objection to the question was made at the time it was asked.

(Footnote 3 continued)

been admissible if made by him while testifying and:

> "(a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;
>
> "(b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and
>
> "(c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time."

It would appear that the question was appropriate in order to show bias on the part of the witness. No claim of dishonesty or deception on the part of the prosecutor is made (See People v. Beivelman, 70 Cal.2d 60, 75-77). We find no basis for the claim of misconduct.

The judgment is affirmed.

/s/ GINSBURG, J.*

We concur:

/s/ BROWN (GEO. A.), P.J.

/s/ GARGANO, J.

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*Assigned by Chairman of Judicial Council.

APPENDIX D

In The United States District Court

For the Northern District of California

No. C-77-2801 SAW

Robert Mata,	)
Petitioner,	)
vs.	)
George Sumner,	)
Respondent(s).	)

[Filed May 23, 1978]

JUDGMENT

In accordance with the accompanying order,

IT IS HEREBY ADJUDGED that the petition for habeas corpus is denied.

Dated: May 22, 1978.

STANLEY A. WEIGEL
Judge

D-2

In The United States District Court

For the Northern District of California

No. C-77-2801 SAW

Robert Mata,

Petitioner,

vs.

George Sumner,

Respondent(s).

[Filed May 23, 1978]

ORDER DENYING PETITION
FOR WRIT OF HABEAS CORPUS

Robert Mata, imprisoned in San Quentin State Prison, Tamal, California, has petitioned for habeas corpus. An Order to Show Cause was filed on January 19, 1978, and a Return to said Order was filed on February 28, 1978. Petitioner filed a Traverse on April 4, 1978. Both parties have filed additional memoranda.

Respondent's first contention is that petitioner's claim cannot be addressed on the merits because he failed to raise some of them in the state courts. Wainright v. Sykes, 433 U.S. 72 (1977). While it is true that petition did not raise all his claims on direct appeal to the state courts, he did raise his other claims in a petition for state habeas corpus. While that petition was denied without opinion, for purposes of habeas corpus review it is assumed that the state court addressed the merits of the petition. Thompson v. Procunier, 539 F.2d 26, 28 (9th Cir. 1976). Thus petitioner has raised all the issues now raised in this proceeding to the California courts. Wainwright is therefore inapplicable.

On the merits, the Court concludes that the petition must be denied. While

petitioner has established that irregularities occurred in the pre-trial photographic identification of petitioner by witnesses Almengor and Allen, these irregularities did not so taint the in-court identifications of petitioner by these witnesses as to establish a constitutional violation under Simmons v. United States v. Baxter, 492 F.2d 150, 172 (9th Cir. 1973), cert.denied, 414 U.S. 801 (1973), 416 U.S. 940 (1974). Moreover, even if the testimony of Allen was tainted, the positive identification of petitioner by witness Childress and the strong one by Almengor makes the error harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

Petitioner's argument that he did not receive effective assistance of counsel is predicated solely upon what he conceives to be the egregious constitutional

violation involved in the photo-identification procedure. Inasmuch as petitioner's claim is at best arguable, his counsel was not incompetent in failing to seek suppression of petitioner's in-court identification, whichever standard of competency is employed. DeKaplany v. Enomoto, 540 F.2d 975 (9th Cir. 1976) (en banc), cert.denied, 429 U.S. 1075 (1977). It is therefore unnecessary to consider which standard the Ninth Circuit will ultimately choose for determining the competency of counsel. Cooper v. Fitzharris, 551 F.2d 1162 (9th Cir. 1977), petition for rehearing en banc granted.

Petitioner's final argument, that the California Court of Appeal lacked an adequate record before it to enable it to review petitioner's appeal, also lacks merit. Petitioner was entitled to

a record of sufficient completeness to enable the appellate court to find error, if there was error, in the proceeding below. Draper v. Washington, 372 U.S. 487, 497-98 (1963). That is precisely what petitioner received.

IT IS THEREFORE HEREBY ORDERED that the petition for writ of habeas corpus is denied.

Dated: May 22, 1978.

STANLEY A. WEIGEL

Judge

APPENDIX E

MATA v. SUMNER

Robert MATA, Petitioner-Appellant,

v.

George W. SUMNER, Warden of the California State Prison at San Quentin, Respondent-Appellee.

No. 78-2636.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 15, 1979.

Decided June 29, 1981.

Appeal from the United States District Court for the Northern District of California.

Before ELY and SNEED, Circuit Judges, and TAKASUGI,* District Judge.

ELY, Circuit Judge:

This case is again before us, our

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*The Honorable Robert M. Takasugi, United States District Judge, Central District of California, sitting by designation.

previous disposition having been vacated and remanded by the United States Supreme Court for further proceedings consistent with its opinion. See 611 F.2d 754 (9th Cir. 1979), mandate stayed, 446 U.S. 1302, 100 S.Ct. 1630, 64 L.Ed.2d 216 (1980) (Rehnquist, Circuit Justice), cert. granted, ___U.S. ___, 100 S.Ct.3055, 65 L.Ed.2d 1139 (1980) vacated and remanded, ___ U.S. ___, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

As the Supreme Court did not quarrel with the merits of our prior decision, see 101 S.Ct. at 771-72, we therefore adopt herein all of that opinion insofar as it discussed the merits of the controversy. The only basis for the Supreme Court's action was our neglect in failing failing explicitly to apply the federal habeas corpus statute, 28 U.S.C.

§ 2254(d),[1/] which requires that

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1. 28 U.S.C. § 2254(d) provides:

> In any proceeding instituted in Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing; (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the state court hearing;

(Footnote 1 continued on next page)

> a habeas court . . . include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors [contained in § 2254(d)] were present, or the reasoning which led it to conclude that the state finding was "not fairly supported by the record."
>
> 101 S.Ct. at 771.

Footnote 1 continued)

> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(Footnote 1 continued on next page)

Having received additional briefing by the parties, we now seek to fulfill the "congressional mandate" of 28 U.S.C. § 2254(d), essential to the "smooth functioning" of our federal system and the alleviation of "friction between state and federal courts." Mindful of the

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(Footnote 1 continued)

> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
>
> And in an evidentiary hearing in the proceeding in the Federal court, when

(Footnote 1 continued on next page)

Court's admonition, and the example of Taylor v. Lombard, 606 F.2d 371, 372, 375 (2d Cir. 1979), cert.denied, 445 U.S. 946, 100 S.Ct. 1346, 63 L.Ed.2d 781 (1980),[2] we have again reviewed the state court record as a whole and have made our own independent legal determination.

(Footnote 1 continued)

> due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

2. See 101 S.Ct. at 769. See also Reardon v. Manson, 644 F.2d 122, at 127-130 (2d Cir. 1981), Rivera v. Harris, 643 F.2d 86, at 97-98 (2d Cir. 1981).

In "full awareness" of § 2254(d), we conclude that our original legal conclusions[3/] were correct. We do not dispute

---

3. We concluded earlier, as we do on remand, that, in the totality of the circumstances, the photographic identification procedures were so impermissibly suggestive "that there was a grave likelihood of irreparable misidentification," 611 F.2d at 758, and that the admission of the in-court identifications by Govern-ment witnesses Rigoberto Almengor and Jay Allen, predicated on the photographic display, was a violation of due process of law protected by the Fourteenth Amend-ment. See 611 F.2d at 759-60 & n.3. Accord United States v. Fowler, 439 F.2d 133, 134 (9th Cir. 1971). See generally Manson v. Brathwaite, 432 U.S. 98, 113-14, 97 S.Ct. 2243, 2252-2253, 53 L.Ed.2d 1247 (1968); United States v. Crawford, 576 F.2d 794, 797-98 (9th Cir.) (per curiam), cert. denied, 439 U.S. 851, 99 S.Ct. 157, 58 L.Ed.2d155 (1978); United States v. Pheaster, 544 F.2d 353, 369-71 (9th Cir. 1976), cert. denied, 429 U.S. 1099, 97 S.Ct. 1118 51 L.Ed.2d 546 (1977); United States v. Calhoun, 542 F.2d 1094, 1104-05 (9th Cir. 1976), cert. denied sub nom. Stephenson v. United States, 429 U.S. 1064, 97 S.Ct.792, 50 L.Ed.2d 199, 209-10 (9th Cir. 1973, cert. denied, 416 U.S. 416 U.S. 940, 94 S.Ct. 1945, 40 L.Ed.2d 292 (1974).

the state court's factual record per se. Thus, the explicit presumption of correctness of state court findings of fact embodied in § 2254(d), absent a conclusion by a reviewing federal court that (a) one of the seven enumerated factors exists, (b) "such factual determination is not fairly supported by the [state court] record,"[4] or (c) that the habeas applicant has established by "convincing proof that the factual determination by the State court was erroneous,"[5] is not invoked in this case. We disagree with the state court over the legal and constitutional significance of certain facts.

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4. 28 U.S.C. § 2254(d)(8).

5. Id. § 2254(d).

[1] Neither the 1966 amendments to § 2254(d) nor the Supreme Court's opinion in this case alters the basic -- indeed, fundamental -- distinction between state court findings of fact, which are presumed correct under § 2254(d), and conclusions of law which are not. See Cuyler v. Sullivan, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-1715, 64 L.Ed.2d 333 (1980) (state court holding that lawyers had not undertaken "multiple representation" is not a "basic, primary or historical fact," but a mixed determination of law and fact that requires the application of legal principles to "historical facts"; that holding does not fall within § 2254(d) and is open to review on collateral attack in a federal court); Townsend v. Sain, 372 U.S. 293, 309 n.6, 310-18, 83 S.Ct. 745, 755 n.6, 755-760, 9 L.Ed.2d

770 (1963);[6] Brown v. Allen, 344 U.S. 443, 497-508, 73 S.Ct. 397, 441-447, 97 L.Ed. 469 (1953) (separate opinion of Frankfurter, J.).[7] See generally

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6. In Townsend v. Sain, which the Supreme Court noted in Cuyler was "the precursor of § 1143(d)," 446 U.S. at 341, 100 S.Ct. at 1714, Chief Justice Warren stated for the majority that "[s]o-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in [the Brown v. Allen, 344 U.SD. 443, 506, 73 S.Ct. 397, 446 97 L.Ed.469 (1953) (separate opinion of Frankfurter, J.)] sense." 372 U.S. at 309 n.6, 83 S.Ct. at 755 n.6. Later, the majority opinion in Townsend held that a reviewing federal court "may not defer to [the state court's] findings of law. It is the [federal] judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas." Id. at 318, 83 S.Ct. at 759-760 (emphasis added).

7. Justice Frankfurter's rendition of the history of the habeas corpus action demonstrates that concerns for federalism are more than a century old:

(Footnote 7 continued on next page)

Sumner v. Mata, ___ U.S. ___, 101 S.Ct. 764, 773-74, 66 L.Ed.2d 722 (1981) (Brennan, J., dissenting); Brookhart v. Janis, 384 U.S. 1, 4, 86 S.Ct. 1245,

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(Footnote 7 continued)

> It was not until the Act of 1867 that the power [of federal courts] to issue the writ was extended to an applicant under sentence of a State court. It is not for us to determine whether this power should have been vested in the federal courts. As Mr. Justice Bradley, with his usual acuteness, commented not long after the passage of that Act, "although it may appear unseemly that a prisoner, after conviction in a state court, should be set at liberty by a single judge on habeas corpus, there seems to be no escape from the law." Ex parte Bridges 2 Woods (5th Cir.), 428, 432.

344 U.S. at 443, 73 S.Ct. at 397 (separate opinion of Frankfurter, J.).

> When the record of the State court proceedings is before the court, it may appear that the issue turns on basic facts and that the facts (in the sense of a recital of external events and the credibility of their narrators) have been tried and adjudicated against the applicant.

(Footnote 7 continued on next page)

1246-1247, 16 L.Ed.2d 314 (1966); Baumgartner v. United States, 322 U.S. 665, 670-71, 64 S.Ct. 1240, 1243-1244, 88 L.Ed. 1525 (1944); Jaffe, Judicial Review: Question of Law, 69 Harv.L.Rev. 239, 246-47, 276 (1955); Strong, The Persistent Doctrine of "Constitutional Fact", 46 N.C.L. Rev. 223 (1968).

(Footnote 7 continued)

> Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge may accept their determination in the State proceeding and deny the application. On the other hand, State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide.
>
> . . . .
>
> Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of

(Footnote 7 continued on next page)

[2] We believe that the impermissible suggestiveness" of the pretrial photographic identification procedure used in this case is a mixed question of law and fact, freely reviewable by a federal court on habeas. Cf. Brewer v. Williams, 430

(Footnote 7 continued)

> such facts, the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.
>
> . . .Although there is no need for the federal judge, if he could, to shut his eyes to the State consideration of such issues, no binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.

Id. at 506-09, 73 S.Ct. at 446-447 (citation and footnote omitted).

U.S. 387, 403-04, 97 S.Ct. 1232, 1241-1242, 51 L.Ed.2d 424 (1977) (the question of waiver of defendant's Sixth Amendment rights "was not a question of historical fact, but one which, in the words of Mr. Justice Frankfurter, requires 'application of constitutional principles to the facts as found . . . .' Brown v. Allen 344 U.S. 443, 507, 73 S.Ct. 397, 446, 97 L.Ed. 469 (separate opinion)"); Neil v. Biggers, 409 U.S. 188, 193 n.3., 93 S.Ct. 375, 379, 34 L.Ed.2d 401 (1972) (due process claim in habeas action; customary deference to lower court's findings of facts is "inapplicable here where the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them"); Brown v. Allen, 344 U.S. at 507,

73 S.Ct. at 446 ("the question whether established primary facts underlying a confession was coerced or voluntary cannot rest on the State decision").

Cognizant of the important intent and function of § 2254(d) in our federal system, we nonetheless adhere to the reasoning and conclusion of our prior decision. As we stated in Taylor v. Cardwell, 579 F.2d 1380, 1383 (9th Cir. 1978), "[w]hile federal courts defer the proper state findings of historical fact, the federal court itself must determine the legal effect of these facts, and it must apply the proper federal legal standard in doing so." Lest the reviewing court "be left to guess" as to our reasons for granting habeas relief notwithstanding the provisions of § 2254(d), we reiterate: As our original analysis

indicates, see 611 F.2d at 755-57, we substantially agree with the "historical" or "basic" facts adduced by the California Court of Appeal, Fifth appellate District, in pages 2-4 of its August 4, 1975 opinion. We disagree, however, with the application of the Simmons standard -- grounded in the due process protections of the federal Constitution -- to the totality of the circumstances of this case. Thus, we reject the legal conclusion of the state court that "[t]e circumstances . . . indicate the inherent fairness of the [pretrial photoraphic identification] procedure, and we find no error in the admission of the identification evidence."

[3] For the reasons set forth in our original opinion[8/] and in this

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8. See 611 F.2d at 757-60; note 3 supra.

supplemental opinion, we conclude -- as we did in the beginning -- that Mata is entitled to a new trial without the introduction of constitutionally impermissible evidence against him. Accordingly, the challenged Order of the District Court is reversed. Upon remand, the District Court will hold the Petition in abeyance for a period of ninety days, within which time California's prosecutors may, if they so choose, initiate a new trial against the appellant, a trial in which prosecutorial evidence barred by the federal Constitution will not be introduced.

REVERSED and REMANDED, with directions.

SNEED, Circuit Judge, dissenting:

For the second time in this case I respectfully, and to some degree sorrowfully, dissent.

It is obvious to me that the majority opinion in Sumner v. Mata, ___ U.S. ___, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), treated the issue whether the photographic identification was impermissibly suggestive as a finding entitled to the "'presumption of correctness' which is mandated by the statute [28 U.S.C. § 2254(d)] to the factual determinations made by the California state courts." ___ U.S. at ___, 101 S.Ct. at 769. It is equally obvious that Justice Brennan's dissenting opinion in Sumner v. Mata, supra, treated the same issue as not entitled to the presumption afforded by section 2254(d) because it was not one of fact but rather one concerning the "constitutional significance of the facts." ___ U.S. ___, 101 S.Ct. at 774.

Judge Ely, speaking for the majority of this court, has adopted Justice Brennan's characterizations of the issue of impermissible suggestiveness. I cannot join in this disregard of the Supreme Court's authority.

On the merits I would remand this case to the district court to permit Mata another opportunity to rebut the presumption of correctness of the finding of the California Court of Appeal with respect to impermissible suggestiveness. As the record presently stands that presumption has not been rebutted. Presumably the Supreme Court also considered it unrebutted because to conclude otherwise is to characterize their opinion as but an hortatory essay and their remand as a futile act. I cannot join in such characterizations.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 78-2636

ROBERT MATA,

Petitioner-Appellant,

v.

GEORGE W. SUMNER,
Warden of the California
State Prison at San Quentin,

Respondent-Appellee.

[Filed August 6, 1981]

ORDER

Before: ELY and SNEED, Circuit Judges, and TAKASUGI,* District Judge

Of the judges constituting the panel originally concerned with the subject cause (Judge Ely, Sneed, and Takasugi), Judges Ely and Takasugi have voted to

*The Honorable Robert M. Takasugi, United States District Judge, Central District of California, sitting by designation.

deny the Petition for Rehearing. Judge Sneed has voted to reject the suggestion for en banc rehearing, and Judges Ely and Takasugi have recommended that such suggestion be rejected.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Opposition

ORIGINAL

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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

NO. 81-844

GEORGE SUMNER, WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,

Petitioner,

v.

ROBERT MATA,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUIN DENVIR
State Public Defender

EZRA HENDON
Deputy State Public Defender

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Attorneys for Respondent

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in its application of the settled principle that a federal habeas court proceeding under 28 USC § 2254(d) should make an independent assessment of a state court's legal conclusions of federal constitutional law;

2. Whether under this Court's totality of the circumstances test in eyewitness identification cases, a court may consider the unnecessary failure of law enforcement officials to conduct a line-up when the identifying witness insists that a line-up is the only reliable method of identification.

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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

NO. 81-844

GEORGE SUMNER, WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN

Petitioner,

v.

ROBERT MATA,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

For purposes of this Opposition, respondent accepts the recitations in the Petition for Writ of Certiorari respecting the opinion below, the jurisdiction of this Court, the constitutional and statutory provisions involved, and those portions of the statement of the case concerning the proceedings in state and federal court. The statement of facts has been extensively summarized by respondent in the brief he filed on the merits in No. 79-1601, to which he respectfully refers the Court.

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SUMMARY OF ARGUMENT

This Court's opinion in Sumner v. Mata, 449 U.S. 539 (1981) undertook to implement the congressional mandate embodied in 28 USC § 2254(d); it did not rewrite the statute or alter basic principles concerning its interpretation. Historically, section 2254(d)(8) has been understood to require that federal habeas courts defer to state court findings of basic, "primary, and historical fact" and not to legal conclusions drawn from those facts. Such conclusions, commonly referred to as "mixed" questions of fact and law, require reassessment by the federal habeas court. Sumner v. Mata, supra, did not alter this principle.

The Court of Appeals in this case properly deferred to and accepted the state court's findings of fact, but disagreed (as it was free to) with respect to the legal conclusions which the state court had drawn from those facts. Detailed analysis of the state court opinion demonstrates the Court of Appeals read the state court opinion correctly. That being so, the opinion from which certiorari is now being sought represents a correct, careful, and largely unremarkable application of standard legal principles and there is no reason to review it.

This Court should not now hear this case on its merits as petitioner urges. The merits were before this Court in Sumner v. Mata, supra, and the Court specifically declined to reach them. There is no reason for the Court to reach the merits now.

The Court of Appeals correctly decided that under this Court's "totality of the circumstances" test in eyewitness identification cases, the necessity to forego a line-up could be considered by the reviewing court if appropriate in a given case. This is such a case. Here the principal eyewitness to

the crime insisted he could not make a proper identification from photographs and asked to see the defendant in a live line-up. There was no reason to forego a line-up. Under these circumstances the failure to conduct a line-up was a factor going to the reliability of the identification which was ultimately made, and as such it was incumbent on the federal habeas court to consider that factor.

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ARGUMENT

I

THE COURT OF APPEALS CORRECTLY APPLIED THE MANDATE OF SUMNER V. MATA, 449 U.S. 539 (1981)

The case tendered to this Court by the petition for certiorari is wholly unremarkable and does not justify this Court's intervention. The Court of Appeals in this case did nothing more than apply principles which have been a settled part of 28 USC § 2254(d) since the statute was enacted. After carefully analyzing this Court's opinion in Sumner v. Mata, 449 U.S. 539 (1981) and the history of section 2254, and after having "again reviewed the state court record as a whole" (Mata v. Sumner, 649 F.2d 713, 715 (9th Cir. 1981)), the Court of Appeals deferred to all relevant state court findings of fact. The federal Court of Appeals disagreed with the California Court of Appeal only with regard to the legal significance of the facts. In pursuing this course, the federal Court of Appeals did not deviate from this Court's mandate in Sumner v. Mata.

Sumner v. Mata, of course, did not operate to rewrite 2254(d), but to implement it. That opinion did not alter the basic principle that, while a federal habeas court must presume a state court's findings of "basic", "primary", or "historic" fact to be correct, it must not abdicate its own responsibility to find the law. Here the Court of Appeals agreed with the state court's facts, but disagreed with what this Court has referred to in Neil v. Biggers, 409 U.S. 188, 192, n. 3 (1972), as "the constitutional significance to be attached to [the facts]". In what follows we demonstrate that when a federal habeas court engages in such a process it is following a path that has been marked for it by opinions of this Court such as Neil v. Biggers, supra, and Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980), and

by numerous lower court opinions both before and after Sumner v. Mata. We look first to the intentions of this Court on the remand in Sumner v. Mata.

A. The Purpose of this Court's Remand

This Court's opinion in Sumner v. Mata does not change the meaning of 28 USC § 2254(d). Rather, it establishes procedures which will serve to implement the statute. In disposing of the case on remand, the Court of Appeals applied principles long settled under section 2254.

The entire purpose of this Court's requiring a statement from the habeas court indicating how it applied section 2254(d) was to enable "Courts of Appeals and this Court to satisfy themselves that the congressional mandate has been complied with." (449 U.S. at 552.) What this Court found objectionable in the Court of Appeals' original opinion was the fact that section 2254(d) had been ignored and that the principles of comity and federalism underlying the statute were given neither weight nor attention. Thus, this Court expressed concern that section 2254(d) had not bee mentioned in the Court of Appeals' original opinion (449 U.S. at 547), and that the presumption of correctness embodied in that section was not expressly or impliedly accorded the findings of the State Court of Appeal. This Court asked the Court of Appeals to provide "in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors [in 2254] were present or the reasoning that led it to conclude that the state finding was 'not fairly supported by the record.'" (449 U.S. at 551.) The purpose behind this requirement was, in part, so that "[n]o court reviewing the grant of an application for habeas corpus should be left to guess as to the habeas court's reasons for granting relief notwithstanding the provisions of section 2254(d)."

This Court contrasted the approach of the Ninth Circuit which had not addressed the question of the State Court of Appeal's findings with that of the Second Circuit in Taylor v. Lumbard, 606 F.2d 371, 375 (2d Cir. 1979), cert. denied 445 U.S. 946 (1980) where that court succinctly but expressly noted that "the County Court's finding that there was no factual basis for the claim of perjury is not fairly supported by the record, and therefore is not entitled to deference. 28 USC § 2254(d)(8)."

In short, this Court has in no way altered the meaning of 2254, but only the procedures for implementing it. The kinds of "findings" to which 2254(d)'s presumption of correctness attaches remain the same after Sumner v. Mata as they were before. What is new -- and all that is new -- is the requirement that the federal habeas court discharge its obligation to deal explicitly with the limitations 2254(d) imposes.

B. The Court of Appeals Fully Satisfied That Purpose

1. The Court of Appeals Explicitly Deferred to State Court Findings of Fact and Correctly Refused to Defer to State Court Conclusions of Law.

The Court of Appeals has done all that this Court has required of it and more. Its analysis of the state court record in this case and of the role 2254 permits a federal court with respect to that record is thorough, explicit, and entirely correct. The Ninth Circuit expressly stated it was "[m]indful of [this Court's] admonition, and the example of Taylor v. Lumbard . . . [as well as other cases noted by the Court of Appeals at n. 2]" (Petition, Appendix E-7, 649 F.2d 713, 715), and acted in "full awareness" of section 2254(d). It "again reviewed the state court record as a whole" and expressly adopted and accepted the state court's findings of fact. The Court of Appeals disagreed with the state court only with regard to "the legal and constitutional significance of certain facts."

(Petition App. E-8, 649 F.2d at 716, emphasis in original.) Specifically, the federal court concluded that the "'impermissible suggestiveness' of the pretrial photographic identification procedure used in this case is a mixed question of law and fact, freely reviewable by a federal court on habeas." (Petition App. E-13, 649 F.2d at 717.) Speaking directly to this Court's concern that it not be "left to guess" as to the Court of Appeals' reasons for granting relief notwithstanding the provisions of section 2254(d), the lower court reiterated:

> "As our original analysis indicates, see 611 F.2d at 755-77, we substantially agree with the 'historical' or 'basic' facts adduced by the California Court of Appeal, Fifth Appellate District, in pages 2-4 of its August 4, 1975 opinion. We disagree, however, with the application of the Simmons standard -- grounded in the due process protections of the federal Constitution -- to the totality of the circumstances of this case. Thus, we reject the legal conclusion of the state court that '[t]he circumstances . . . indicate the inherent fairness of the [pretrial photographic identification] procedure, and we find no error in the admission of the identification evidence.'" (Petition App. E-16, 649 F.2d at 717, emphasis in original.)

The Court of Appeals' analysis of the requirements of 2254(d) is supported by the history of that section and by the way the section has been construed by this Court and by the lower federal courts both before and after this Court's prior decision in this case. 28 USC § 2254(d) was passed in 1966 at the urging of the Judicial Conference of the United States. (See 1966 U.S. Code Congr. and Admin. News, p. 3663.) From its inception, the statute has been understood to be a condification of this Court's opinion in Townsend v. Sain, 372 U.S. 293 (1963). (See, e.g., Brewer v. Williams, 430 U.S. 387, 395 (1977) "[2254(d)] codifies most of the criteria set out in Townsend v. Sain"; La Vallee v. Rose, 410 U.S. 690, 694 (1963).) Specifically, the term "finding of fact" to which deference is due means -- in Townsend's language -- those "basic, primary, or

histcrical facts: facts 'in the sense of a recital of external events and the credibility of their narrators.' . . . So-called mixed questions of fact and law, which require the application of a legal standard to the historical fact determinations are not facts in this sense." Townsend v. Sain, supra, 372 U.S. at 309, n. 6, quoting from Brown v. Allen, 344 U.S. 443, 506 (1953) (concurring opin., Frankfurter, J.).

The distinction 2254(d) makes between findings of "basic, primary, and historical" fact (to which a presumption of correctness attaches) and the legal conclusions to be drawn from those basic facts (which enjoy the benefit of no such presumption) has been universally recognized both by this Court (see, e.g., Cuyler v. Sullivan, supra, 446 U.S. at 341-42; Brewer v. Williams, supra, 430 U.S. at 503-04) and by the Courts of Appeals (see, e.g., Taylor v. Cardwell, 579 F.2d 1380, 1383 (9th Cir. 1980); Sutton v. Lash, 576 F.2d 738, 745 (7th Cir. 1978); Mason v. Balcom, 531 F.2d 717, 721-22 (5th Cir. 1976); Gunsby v. Wainwright, 596 F.2d 654, 655 (5th Cir. 1979), cert. denied ___ U.S. ___, 100 S.Ct. 307 (1980); United States ex rel. Rush v. Ziegerle, 474 F.2d 1356, 1358-59 (3rd Cir. 1973).) This fact/law distinction continues to be drawn even after this Court's opinion in Sumner v. Mata. See, e.g., Scurr v. Moore, 674 F.2d 854, 859 (8th Cir. 1981); Solomon v. Smith, 645 F.2d 1179, 1185 (2d Cir. 1981); Foster v. Strickland, 515 F.Supp. 22, 23 (N.D. Fla. 1981); McBryar v. McElroy, 510 F.Supp. 706, 709 (N.D. Ga. 1981); Brown v. Cuyler, 510 F.Supp. 171, 175 (E.D. Pa. 1981); Bishop v. Parratt, 509 F.Supp. 1140, 1144 (D. Neb. 1981); Sher v. Stoughton, ___ F.Supp. ___, 29 Cr.L. Rptr. 2333 (N.D.N.Y. 1981).

The very same analysis employed by the Court of Appeals in this case was used by this Court in another eyewitness identification case: Neil v. Biggers, supra, 409 U.S. at 192. In

Biggers the Court was faced with the "findings" of two lower federal courts that an eyewitness identification was impermissibly suggestive. This Court rejected the lower court findings because the so-called findings below were in reality conclusions having to do with the legal significance of the basic, primary facts. According to Biggers, supra, 409 U.S. at 192, n. 3:

> "This rule of practice, under which the Court does not lightly overturn the concurrent findings of fact of two lower federal courts, is a salutary one to be followed where applicable. We think it inapplicable here where the dispute between the parties is not so much over facts as over the constitutional significance to be attached to them."

Biggers, then, represents nothing less than a ruling by this Court that the ultimate issue of whether an identification is suggestive is one of "constitutional significance" and is not a factual conclusion to which this Court owes or should accord any deference.[1/]

2. The State Court Opinion in This Case Contained Mixed Conclusions of Fact and Law, and the Federal Court of Appeals Was Therefore Correct in Not Deferring to Them

Close analysis of the California Court of Appeal opinion demonstrates the federal court did not fail to defer to any "basic", "historical", or "primary" facts.

After three short sentences recounting the procedural history of the case, the California Court of Appeal opinion contains a brief four paragraph introductory section entitled "FACTS". (Petition App. C-2-C-4.) This section is a recapitulation

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1. Biggers is similar in this respect to Baumgartner v. United States, 322 U.S. 665, 670-71 (1944) where the court also declined to follow the so-called "findings" of two lower federal courts that Baumgartner's citizenship had been obtained by fraud. Baumgartner, from which Justice Frankfurter drew in his concurring opinion in Brown v. Allen, supra, 344 U.S. at 506, distinguishes between the kinds of basic, primary data which this Court should presume as correct, and the larger, abstract conclusions to be drawn from those data which it is this Court's responsibility to reassess.

of the facts of the murder itself, and consists of true primary facts. No one disputes these primary facts and the Ninth Circuit Court of Appeals here explicitly deferred to them. (649 F.2d at 717, Petition, App. E-16.) This introductory section is followed by a section entitled "The Photographic Lineup Procedure." (Petition App. C-4.) It, too, is brief, consisting of three paragraphs detailing the basic facts of the identification procedure conducted at Tehachapi on October 19, October 27, and October 30, 1972. The section indicates the course of the identification process, recounting who made identifications and who did not. Again, no one has ever disputed these basic facts, and the federal Court of Appeals did not dispute them in this case.

There then follow in the state court opinion two paragraphs of discussion of applicable case law and a final paragraph which reads as follows:

> "Reviewing the facts of the present case to determine if the particular photographic identification procedure used contained the proscribed suggestive characteristics, we first find that the photographs were available for cross-examination purposes at the trial. We further find that there is no showing of influence by the investigating officers: that the witnesses had an adequate opportunity to view the crime; and that their descriptions are accurate. The circumstances thus indicate the inherent fairness of the procedure, and we find no error in the admission of the identification evidence." (Petition App. at C-8.)

It is perfectly apparent from both the structure of the opinion and the "findings" with which the photo-identification section concludes that the state court first stated the facts and then found the law. The first three paragraphs of the photo-identification section spell out the facts of the identification, the cases are discussed, and a conclusion is then reached with regard to the adequacy and fairness of the procedures.

There are five so-called "findings" in this last paragraph:

(1) That the photographs were available for cross-examination; (2) that there is no showing of "influence" by the investigating officers; (3) that the witnesses had an "adequate" opportunity to view the crime; (4) that the descriptions of the witnesses are "accurate"; and (5) that the identification procedures were inherently "fair".

Except for (1), it is obvious that each item constitutes not a finding of primary, historic fact, but a mixed conclusion of fact and law. Thus, for example, the determination whether a confession is involuntary is a mixed question of fact and law which the habeas court must resolve independently of any state court conclusion to the contrary. (See, e.g., Gunsby v. Wainwright, supra, 596 F.2d 654, 655; Taylor v. Cardwell, supra 579 F.2d at 1383; Lee v. Hopper, 499 F.2d 456, 462 (5th Cir.), cert. denied 419 U.S. 1053 (1974); United States ex rel. Rush v. Ziegerle, supra, 474 F.2d at 1358-59.) By the same token, whether counsel rendered constitutionally adequate assistance is a mixed question of fact and law. (See, e.g., Mason v. Balcom, 531 F.2d 717, 722 (5th Cir. 1976); Lee v. Hopper, supra; Cuyler v. Sullivan, supra, 446 U.S. 335, 341-42.) The same is true for whether factually based action or inaction by a defendant amounted to a "waiver" of constitutional rights (see Sutton v. Lash, supra, 576 F.2d at 745) or whether evidence withheld from a defendant by a prosecutor was "exculpatory" (Flemmi v. Gunter, 410 F.Supp. 1361, 1373-74 (D. Mass. 1976)).

We submit there can be no meaningful difference between whether a confession is uninfluenced and "voluntary" and whether an identification procedure is uninfluenced and "fair". There is no principled basis on which to distinguish between a conclusion that counsel in a given criminal case was "adequate" in the defense he provided, and a conclusion that

the opportunity to view a suspect in a given identification was "adequate", or that a given description was "accurate". Questions of "influence", questions of "adequacy", question of "accuracy" and questions of "fairness" are none of them findings of primary, historic facts, but rather questions of "the constitutional significance to be attached to [those facts]." Neil v. Biggers, supra, 409 U.S. at 192, n. 3.

This conclusion seems compelled by Biggers which, as we have seen, flatly concludes that questions of the suggestiveness and reliability of an eyewitness identification are the precise issues which are reserved to the federal habeas corpus court for decision.

3. The Court of Appeals Correctly Found All Material Facts

Finally, petitioner isolates some four "facts" to which, he believes, the Court of Appeals did not accord proper deference. But assuming a detailed, fact-bound disagreement of this nature between a federal court and a state court is of sufficient moment to justify review by this Court, petitioner is inaccurate even as to these so-called disputes. First, petitioner's contention (Petition at 29) that the disagreements over (1) the adequacy of the witness' opportunity to view the scene and (2) whether there was "undue influence" on the witnesses are governed by 2254(d) is erroneous. For, according to Neil v. Biggers, supra, 409 U.S. at 199-200 and Manson v. Braithwaite, 432 U.S. 98, 114 (1977) the legal standard for assessing whether an identification was improper includes "the opportunity of the witness to view the criminal at the time of the crime, [and] the witness' degree of attention." It is thus obvious that while such matters as the position of the witnesses or the amount of time they may have had to view the scene are

deferrable fact-findings, whether the opportunity to view was constitutionally "adequate" is a mixed question of fact and law. (See also Solomon v. Smith, supra, 645 F.2d 1179, 1184, n. 2 (2d Cir. 1981).) Petitioner also objects to (3) the Court's ascription of a motive on the part of prison officials to avoid counsel at a line-up and (4) to the fact that the federal court did not expressly adopt the state court's finding that Allen and Almengor did not see the defendants when they were removed from their cells to be rephotographed. But the short answer to both objections is that the federal Court of Appeals did not rely on either fact in reaching its decision. (See Mata v. Sumner, 611 F.2d 754, 758-59 (9th Cir. 1979), vacated and remanded, Sumner v. Mata, 449 U.S. 539 (1981).)

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The Ninth Circuit Court of Appeals has fully and completely satisfied every reasonable requirement imposed by section 2254(d). It has reviewed and accepted all relevant and important state court findings of fact. That review was more careful and explicit than the review accorded in Taylor v. Lumbard, supra, which this Court approved in Sumner v. Mata, and more careful than the passing review engaged in by other federal courts. See, e.g., Batten v. Scurr, 649 F.2d 564 (8th Cir. 1981); Koski v. Samaha, 648 F.2d 790 (1st Cir. 1981); Scurr v. Moore, supra, 647 F.2d at 859; Johnson v. Perini, 644 F.2d 573 (6th Cir. 1981); Peardon v. Manson, 644 F.2d 122 (2d Cir. 1981); Perkins v. LeFerre, 642 F.2d 37 (2d Cir. 1981); Germany v. Estelle, 639 F.2d 1301 (5th Cir. 1981). The federal Court of Appeals has reassessed only state court conclusions of law. This it was duty bound to do as the history of 2254(d), the cases of this Court, and of the lower federal court demonstrate.

The petition should be denied.

II

THE COURT SHOULD NOT NOW REVIEW THIS CASE ON ITS MERITS

The petition for certiorari tenders the identical question which this Court explicitly and expressly declined to reach the last time the case was here: whether the Court of Appeals acted erroneously on the merits of the identification claim. Not only is there no reason why the Court, having declined to reach the merits the last time, should accept the case on its merits now, the argument on its merits is simply not "cert-worthy".

The Court of Appeals, relying, in this Court's words on "the basic Simmons [v. United States, 390 U.S. 377 (1968)] case" (Sumner v. Mata, supra, 449 U.S. at 552) followed and applied longstanding and fairly routine legal principles. Its opinion was squarely premised on the "totality of the circumstances" test approved by this Court for use in eyewitness identification cases. (See Manson v. Braithwaite, supra, 432 U.S. at 114; Neil v. Biggers, supra, 409 U.S. at 199-200.) The Court of Appeals made clear that under that test lack of necessity to hold a line-up was only one factor in the overall determination and that "'the focus is on the reliability of the witness' identification.'" (Mata v. Sumner, supra, 611 F.2d at 758, quoting from United States v. Barron, 575 F.2d 752, 754 (9th Cir. 1978).)

This application of the totality of the circumstances test adds nothing new, and certainly does not, as petitioner suggests (Petition, p. 42) "conflict with the interpretation of this Court's holdings reached by the other circuits . . . ." In fact, as we will soon see necessity or the lack of it have been factors considered by this Court and by the other

circuits in determining whether a particular identification is constitutionally suspect.

A. The Totality of the Circumstances Test Permits a Consideration of Lack of Necessity to Conduct a Line-Up When Appropriate

The totality of the circumstances test adopted by this Court in Manson v. Braithwaite, supra, and Neil v. Biggers, supra, holds that reliability is a function of any and all factors which may be relevant. In neither Manson nor Biggers did this Court hold that necessity may never be considered. Rather, Biggers rejected the notion that an unnecessarily suggestive identification by definition and "without more" violates due process. The question Biggers addressed was "whether . . . unnecessary suggestiveness alone requires the exclusion of evidence." 409 U.S. at 199 (emphasis added). And Manson actually appeared to recognize that there can exist factors which may "alleviate" an otherwise suggestive identification.[2/] Biggers and Manson thus clearly do not hold that necessity or the lack of it may not be considered at all, but only that lack of necessity without more and unconnected to considerations of reliability is not a ground for invalidating an identification. Indeed, necessity has been a factor in several of the eyewitness identification decisions of this Court. (See Simmons v. United States, 390 U.S. 377, 384 (1968); Stovall v. Denno, 388 U.S. 293, 302 (1967).) And necessity was a factor in cases relied on by Manson.

In rejecting the per se rule as overly rigid and automatic, this Court in Manson looked to the opinion of Mr. Justice (then Judge) Stevens in United States ex rel. Kirby v. Sturges, 510 F.2d 397 (7th Cir.), cert. denied 421 U.S. 1016

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2. "The per se rule, however, goes too far since its application automatically and preemptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliabile and relevant." 432 U.S. at 112 (emphasis added).

(1975). See Manson, supra, 432 U.S. at 112. There the totality of the circumstances test was divided into three parts as follows:

> "Three different aspects of the 'totality of the circumstances' have been noted in cases testing the admissibility of pretrial identification evidence. The suggestive aspects of the procedures were emphasized in Palmer v. Peyton, 359 F.2d 199, 201 (4th Cir. 1966) and Foster v. California, 394 U.S. 440, 442-43; the justification for using a suggestive procedure was the apparent basis of decision in Stovall v. Denno, 388 U.S. 239, 302; and the reliability of the identification was critical in Neil v. Biggers, 409 U.S. 188, 199; and Coleman v. Alabama, 399 U.S. 1, 5-6." (510 F.2d at 402-03, emphasis in original, footnotes omitted.)

After noting that there was no justification for failure to conduct a corporeal line-up, the Seventh Circuit stated "But as the Court squarely held [in Biggers] these two defects without more, do not necessarily result in a deprivation of due process."

B. There is No Split in the Circuits on the Question Whether the Totality of the Circumstances Test Permits a Consideration of Necessity in Appropriate Cases

It is simply not true as petitioner suggests (Petition at 42) that there is a split in the circuits on the question whether necessity can be considered as part of the determination whether an identification is constitutionally suspect.

In fact, necessity in one form or another is widely recognized as a factor to be considered as part of the totality of the circumstances. See, e.g., United States v. Crawford, 576 F.2d 794, 797-98 (9th Cir.), cert. denied 439 U.S. 851 (1978); United States v. Peele, 574 F.2d 489, 490 (9th Cir. 1978); Frank v. Blackburn, 605 F.2d 910, 913 (5th Cir. 1979) (single person showup may be made necessary and acceptable by exigent circumstances); Israel v. Odom, 521 F.2d 1370, 1373 (7th Cir. 1979) ("If . . . suggestivenss is found, the court must . . .

consider whether any unusual or exigent circumstances existed which might, at least in part, have justified the use of the faulty procedures."); United States v. Dailey, 524 F.2d 911, 914 (8th Cir. 1975) (lack of necessity to show witnesses photographs of defendant prior to trial); Clemons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230, 1245-46 (D.C. Cir. 1968); Government of Virgin Islands v. Petersen, 553 F.2d 324, 327 (3rd Cir. 1977).

These cases make clear, then, that totality of the circumstances is a standard embracing exactly what it means -- all circumstances affecting reliability -- and that while necessity alone is not a valid basis for reversal it is a factor which can be considered, especially where -- as here -- necessity and reliability are bound up with one another.

While lack of necessity is clearly not per se a basis for reversal, and while the existence of necessity will not render "a blatantly suggestive and totally unreliabile identification admissible" (United States ex rel. Kirby v. Sturges, supra, 510 F.2d at 403, n. 15) an inquiry into necessity can be appropriate in a given case. There is an undoubted law enforcement interest in identification evidence, both to free the innocent and to convict and apprehend the guilty. While there is clearly a line beyond which an identification becomes so suggestive that no amount of necessity will legitimize it, the fact is necessity or the lack of it has been a part of the equation in cases in this Court and the lower federal courts. Also, the methods employed by law enforcement in conducting eyewitness identifications are relevant both to suggestiveness and reliability. A manipulated procedure can unduly suggest an unreliable answer to the witness. Where the most reliabile method of identification is deliberately bypassed by the police for no reason whatever, an inference of manipulation may be justified.

C. Lack of Necessity Was Tied to Reliability in the Present Case, and Thus Was Appropriately Considered by the Court of Appeals

It is generally recognized that a line-up is a more reliable method of identification than a photographic display. See Simmons v. United States, supra, 390 U.S. at 383; Grano, Kirby, Biggers and Ashe: Do Any Constitutional Safeguards Remain Against Convicting the Innocent?, 72 Mich. L. Rev. 717, 769 (1974); Libling, The Use of Photographs for the Purpose of Identification, 1978 Crim. L. Rev. 343, 345; Williams and Hammelman, Identification Parades, 1963 Crim. L. Rev. 479, 484; Comment, Photographic Identification: The Hidden Persuader, 56 Iowa L. Rev. 408 (1970); Comment, 1972 Utah L. Rev. 100, 104.

In this case that assessment is borne out by the statements of the witnesses themselves. In the first place, both witnesses complained repeatedly about the qualify of the photographs. Second, Almengor testified repeatedly that he needed a physical line-up in order to make a postive identification. And third, this record contains proof of the importance of a line-up to a reliable identification. After having tentatively identified Vargas from Exhibit 24 on October 30, 1972, Allen and Almengor left the room and were being escorted back to their cells when they saw Vargas in the shower. At that point, the witnesses, with Vargas standing before them, knew immediately that their photographic identification had been erroneous and they so informed the correctional authorities.

The witnesses' combined insistence that the photographs they were presented with were inadequate, their statements that they needed to see the defendants in a line-up in order to make a reliable identification, and their recanting of their identification of Vargas upon seeing him before them were all facts affecting the reliability of the photographic spread itself.

It is absurd to suggest -- and this Court has never suggested -- that under these circumstances the failure to conduct a line-up could not be considered as part of the suggestiveness-reliability equation. And once it is conceded that failure to conduct a line-up is a factor tied to reliability, necessity must also be considered. For, as already noted, exigent circumstances and police manipulation can both be relevant to the propriety of identification procedures.

The issue of necessity was, on the facts of this case, properly considered by the Court of Appeals.

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CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

DATED:

Respectfully submitted,

QUIN DENVIR
State Public Defender

Ezra Hendon

EZRA HENDON
Deputy State Public Defender

EH:smc

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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

NO. 81-844

GEORGE SUMNER, WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,

Petitioner,

v.

ROBERT MATA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, ROBERT MATA, by and through his counsel, asks leave to file the attached Opposition to Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court.

The affidavit of respondent in support of this motion is attached hereto and incorporated herein.

DATED: December 2, 1981

Ezra Hendon

EZRA HENDON
Deputy State Public Defender

Attorney for Respondent

12/

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,

GEORGE SUMNER, Petitioner

v.

ROBERT MATA

AFFIDAVIT

I, ROBERT MATA, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees: 1. I am the respondent in the above-entitled case. 2. I am confined to California State Prison and because of my poverty I am unable to pay the costs of said cause. 3. I am unable to give security for the same. 4. I believe that I am entitled to prevail in said case. 5. The nature of said cause is briefly stated as follows:

On July 4, 1973, I was sentenced to life imprisonment for first degree murder in the Superior Court of California, County of Kern. A petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging that conviction was subsequently filed in and denied by the United States District Court for the Northern District of California. That decision was reversed on appeal (Mata v. Sumner, 611 F.2d 754 (9th Cir. 1979); this Court then vacated and remanded for further proceedings (101 S.Ct. 764 (1981)). The Court of Appeals' order on remand is the subject of the present petition for certiorari.

OFFICIAL SEAL
T D O'DAY
NOTARY PUBLIC - CALIFORNIA
SACRAMENTO COUNTY
My comm. expires AUG 5, 1983

Robert Mata
ROBERT MATA

Duly witnessed and sworn to
before me, a Notary Public,
this 14 day of SEPT, 1981.

T D O'Day
NOTARY PUBLIC

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-844

GEORGE SUMNER, WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,

Petitioner,

v.

ROBERT MATA,

Respondent.

CERTIFICATE OF SERVICE

EZRA HENDON certifies as follows:

1. That he is an attorney admitted to practice law in the State of California, a member of the Bar of this Court, and the attorney for respondent.

2. That on December 2, 1981, he placed one copy of the Motion to Proceed in Forma Pauperis in the United States mails at San Francisco, California, in an envelope with postage prepaid thereon, to attorney for petitioner, as follows:

GEORGE DEUKMEJIAN
Attorney General
State of California
6000 State Building
San Francisco, CA 94102

3. That he certifies that all parties required to be served have been served.

DATED: December 2, 1981

Ezra Hendon

EZRA HENDON
Deputy State Public Defender